88-125

No.

In The

Supreme Court of the United States

LEWIS SIMON
and
S-J FINANCIAL CORPORATION,
Petitioners,

v.

F/S AIRLEASE II, INC., GREYCAS, INC. and THE SWIG INVESTMENT COMPANY AIRCRAFT TRUST NO. 1,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

Section 503(b)(1)(A) of the Bankruptcy Code authorizes the payment of "commissions" to persons for "preserving the estate." Section 327(a) of the Bankruptcy Code allows for employment of professional persons "with the court's approval" pursuant to the petition of the trustee or debtor-in-possession, and sections 330(a) and 503(b)(2) authorize the payment of "compensation" to such professional persons based upon the value of, and time spent in providing the services.

The questions presented are:

1. Whether aircraft leasing agents who admittedly preserved the sole asset of the estate are

precluded from receiving their agreed commission under §503(b)(1)(A) because the debtor-in-possession failed to obtain a court order employing petitioners as professional persons prior to that preservation, thus rendering §503(b)(1)(A) inoperative and making the professional person sections of the Bankruptcy Code the sole and exclusive remedy for business people who rehabilitate the business of the debtor-in-possession?

2. Whether the procedure for professional person approval (§327(a) and Bankruptcy Rule

2014(a)) which requires the debtor-in-possession to petition for and obtain "the court's approval", but does not specify prior approval, may be used as a complete bar to compensating aircraft leasing agents who rehabilitated the business of the debtor-in-possession, where the debtor-in-possession promised, but failed through its own oversight, to obtain an order signifying the Bankruptcy Court's approval of the agents' services prior to the agents' rehabilitation of the business?

LIST OF PARTIES *

The Appellants and Cross-Appellees in the United States Court of Appeals for the Third Circuit were respondents F/S Airlease II, Inc., a debtor-in-possession lease company under Chapter 11 of the Bankruptcy Code, the Swig Investment Company Aircraft Trust No. 1, the owner of the aircraft, and Greycas, Inc., the secured lender or mortgagee of the aircraft.

The Appellees and Cross-Appellants in the Third Circuit (petitioners here) were Lewis Simon and S-J Financial Corporation, the aircraft leasing agents who negotiated and procured an aircraft lease for the parties in the Bankruptcy Court.

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* Petitioner S-J Financial Corporation states that there are no parent companies, subsidiaries or affiliates to list pursuant to Rule 28.1 of this Court.

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Respondents.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

The Petitioners request this Court to issue a writ of certiorari to review the opinion of the United States Court of Appeals for the Third Circuit filed on March 21, 1988, the denial by that court

of a petition for rehearing on April 19, 1988, and its judgment entered in accordance therewith on May 20, 1988.

OPINIONS BELOW

The decision of the Court of Appeals for the Third Circuit, to which the issuance of a writ of certiorari is sought, is dated March 21, 1988. That decision is reported at 84 F.2d 99 (3rd Cir. 1988) and it reversed the judgment of the United States District Court for the Western District of Pennsylvania approving petitioners' employment. The Court of Appeals' decision, and denial of rehearing, appear as Appendix A hereto.

The decision of the United States District Court for the Western District of Pennsylvania is reported at 84 B.R. 389 (W.D. Pa. 1986). The District Court's decision affirmed the Bankruptcy

Court's approval of petitioners' employment, but vacated the monetary award and remanded for further documentation. It appears as Appendix B hereto.

The decision of the United States Bankruptcy Court for the Western District of Pennsylvania is reported at 59 B.R. 769 (Bankr. W.D. Pa. 1986). The Bankruptcy Court entered an order, nunc pro tunc, approving petitioners' employment, and awarded petitioners $450,000 for their services. That decision appears as Appendix C hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on May 20, 1988, reversing the decision of the District Court. The Court of Appeals issued an order on April

19, 1988 denying petitioners' petition for rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES AND RULE INVOLVED

Bankruptcy Code sections 327(a), 330(a), 503(b)(1)(A), and 503(b)(2), 11 U.S.C. §§327(a), 330(a), 503(b)(1)(A) and 503(b)(2). Bankruptcy Rule 2014(a). The relevant portions of the foregoing statutes appear as Appendix D hereto.

STATEMENT OF THE CASE

This is a reorganization proceeding under Chapter 11 of the Bankruptcy Code. The debtor-in-possession, F/S Airlease II, Inc., is a lease company whose sole asset consists of the leasehold rights in a Boeing 737 aircraft. F/S Airlease II, Inc. originally came into existence in the spring of 1980. At that time, the aircraft was purchased by its current owners, the Swig Investment Company Aircraft Trust No. 1. Financing for the purchase was supplied by a secured lender, Greycas, Inc. The owners in turn leased the aircraft to F/S Airlease II, Inc. for a term of eighteen (18) years. F/S Airlease II, Inc. (hereinafter sometimes referred to as "the lease company" or the "debtor-in-possession")

thus possesses the leasehold rights to the aircraft until August 31, 1998.

The lease company initially leased the aircraft to Air Florida in 1980. After Air Florida filed for bankruptcy in the summer of 1984, the lease company regained possession of the aircraft. Because the secured lender sought to foreclose on its security interest following Air Florida's demise, due to non-payment under its note and security agreement the lease company itself filed for reorganization in the Bankruptcy Court for the Western District of Pennsylvania in August of 1984.

From the outset of the lease company's reorganization, it faced a major problem: Air Florida had cannibalized the aircraft. The number two engine was missing, as well as numerous other parts. The lease company,

as a debtor-in-possession, therefore retained an appraiser to place a value on the aircraft and to determine the necessary cost of repair. That appraiser determined the value of the aircraft in August of 1984 as $5,252,000 "where is-as is" in its non-airworthy condition (A. 1502-1504). Moreover, the appraiser determined at that time that the cost of repair to replace the missing engine and return the aircraft to airworthy condition would be $763,500. Despite the condition of the aircraft, the owner of the aircraft refused to expend that amount to repair the aircraft, and the lease company was unable to do so.

Instead of taking by itself the necessary steps to rehabilitate its business, the lease company, through its president, Mr. Uhl, requested petitioner,

Lewis Simon,[1] to find a new lessee for the aircraft while it was in its non-airworthy condition. Mr. Uhl thereafter assured Mr. Simon that his compensation for his services would be a priority claim, and that the Bankruptcy Court was aware of and permitted Mr. Simon's services and activities (A. 1250-1251; 1274-1275, 1335).

Without disclosure to the petitioners, Mr. Uhl "just overlooked" obtaining court approval of petitioner's employment and financial arrangement because Mr. Uhl was so busy with another corporation's reorganization for which he was also responsible. Mr. Uhl testified at trial that the lease company's failure to seek such approval was "simply an

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1. Petitioner Lewis Simon conducts his aircraft leasing activities through S-J Financial Corporation, a closely held corporation.

oversight" (A. 675-676, 753-754, 1346-1349).

However, when petitioner Lewis Simon questioned Mr. Uhl, regarding his services for the lease company and payment for those services, Mr. Uhl represented to Mr. Simon the following:

> ". . . if, in fact, no new lease were bought here there would be no fee; furthermore . . . it had been my general experience, having been before this bankruptcy court, at that time, for three plus years, that if someone did, in fact, bring value to the estate, that they would be entitled to be compensated for having brought value to the estate." (A. 1335) (emphasis added).[2]

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[2]. Mr. Uhl's representations regarding the practice of the two bankruptcy judges, Judge Gibson and Judge Cosetti, in the Bankruptcy Court for the Western District of Pennsylvania, accurately stated the prevalent practice there, as Judge Cosetti confirmed (A. 457-458). Mr. Uhl conceded at trial that the lease procured by petitioners was valuable to the estate (A. 742).

During this period when petitioners were attempting to locate a new lessee for the aircraft, petitioner Lewis Simon attended a Pittsburgh meeting that was held at the offices of counsel for the lease company, on October 3, 1984 (A. 1237-1238). Representatives of and attorneys for the lease company, the owner of the aircraft, and the secured lender also attended. The agreement reached at that meeting regarding the remarketing of the aircraft was disclosed to the Bankruptcy Judge at the hearing on the approval of the aircraft lease obtained by petitioners. One of the lease company's attorneys, who also attended the October 3, 1984 meeting at his office, informed the Bankruptcy Judge of the agreement:

> ". . . while cooperation has been off and on between the Debtor and Greycas, there was compromising as a result of

> a meeting held in Pittsburgh . . . when it was agreed that Mr. Lou Simon, who is in the courtroom today, would be the single spokesman for the purpose of leasing this airplane. That way, the people in the business of leasing airplanes would not be assuming that they could trade one negotiator off against another.
>
> Mr. Lou Simon did communicate with Greycas and the Debtor and other people that he knows in the industry and has succeeded in negotiating a lease with Aloha Airlines with which, I believe, the Judge is familiar." (A. 186).

Mr. Lehman, the vice-president and treasurer of the lease company, also attended that October 3, 1984 meeting and agreed that there was a "general consensus" that Mr. Simon would be the remarketing "agent" for the aircraft (A. 635-636). Neither Mr. Pink nor Mr. Roth from Greycas objected to that consensus (A. 636, 720-724).

The agreement reached in Pittsburgh in October 1984 is amply confirmed and evidenced by the subsequent conduct of the parties. Greycas, the secured lender, invited Mr. Simon to fly out to Phoenix and meet with America West Airlines, a prospective lessee for the aircraft, during which meeting the Greycas people introduced and represented Mr. Simon as ". . . the representative of the owners of the aircraft. . ." and the person who ". . . was handling the marketing of the aircraft" (A. 517-520; 1239-1243, 1362, 1390-1393). That meeting at America West occurred on October 5, 1984, in Phoenix, just two days after the Pittsburgh meeting. Only Mr. Simon made a proposal to America West at this meeting, and Greycas did not object to him doing so (A. 519-524, 548-549). Much of the discussion at the

America West meeting concerned the serious fact that the plane only had one operable engine and was therefore not airworthy (A. 519-522).

On October 25, 1984, Mr. Simon obtained a signed letter agreement for the aircraft from Aloha Airlines, Inc., an established and financially sound carrier (A. 1266-1267), for a ten year lease at $90,000 per month, under which Aloha would furnish another operable engine with no credit or rental rebate for supplying a missing engine (A. 778-780; 1245). Absent Aloha's agreement to furnish another operable engine itself, the owner, the lease company or the secured lender would have been required to spend more than $500,000 for a substitute engine. Mr. Simon further obtained Aloha's agreement to return the aircraft at the end of the lease term

with two operable engines (A. 535-537; 638-640, 695-696; 1258-1260). Both the lease company and the secured lender were notified that Mr. Simon had procured Aloha as a new lessee (A. 1678). The Aloha letter agreement over the following month was converted into a draft lease, the terms of which were negotiated by Mr. Simon, and put into final form by the lease company's attorneys with the assistance of Mr. Simon (A. 335-336; 1234, 1251-1254).

Aloha's "high regard" for Mr. Simon was a "principal reason for Aloha being willing to go forward with this transaction and a principal cause of Aloha's consummation of this transaction was the involvement of Lewis Simon as the representative and negotiator for the lease of Aircraft." (A. 794). Mr. Simon had dealt with Aloha Airlines for 18

years (A. 794; 1230-1231). Aloha learned of the availability of this Boeing 737-200 through Mr. Simon's efforts. Due to the bankruptcies of F/S Airlease II, Inc. and Air Florida, Inc., and the presence of only one engine on the aircraft, Aloha was "unwilling to proceed" without Simon's participation. (A. 794; 1255-1258).

The lease company, as a debtor-in-possession, filed a motion to approve the Aloha lease and Bankruptcy Judge Gibson set a hearing thereon for November 28, 1984. Prior to the hearing, counsel for the lease company assured petitioners' counsel, who had not yet appeared in the case, that Mr. Simon's involvement with initiating, procuring and negotiating this lease would be "spread of record" and included "in any order approving the lease . . ." (A. 792), and that any

questions as to the distribution of funds to be generated by the lease would be postponed for later determination.[3]

Based on these assurances, Mr. Simon brought the signed lease from Chicago, Illinois to the lease approval hearing in Pittsburgh Pennsylvania, testified as a proponent thereof during the hearing and communicated with Aloha by phone when proposed modifications were suggested at the hearing (A. 1254-1258). The

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[3]. The opinion of the court of appeals implies, without any evidentiary support other than this letter, that petitioners agreed to postpone the issue of their employment until after the lease was approved. 844 F.2d at p. 102, 107. The letter, however, in the context of the prior representations made to Mr. Simon, and the meetings he attended with the parties in question, shows that petitioners wanted a record made on Mr. Simon's role in procuring the lease, and also did not want funds distributed before petitioners could seek compensation for their own efforts.

attorneys for the lease company debtor-in-possession made specific representations to Bankruptcy Judge Gibson, before Mr. Simon testified at the lease approval hearing, as follows:

> MR. SNYDER: Your Honor, would it be possible for us to put Mr. Lou Simon on the stand. He has been negotiating with Aloha. He has brought the signed lease to us this morning, flown in from Chicago as it was flown into him yesterday. I think it is important that the Court might hear the urgency of the matter in the terms of Aloha's situation. I think we should hear from the gentleman that negotiated the lease.
>
> . . . .
>
> MR. McCULLOUGH: I would ask for a clarification, Your Honor, because I keep hearing that we are going to go back and discuss and look at what the deal is. I have dealt with and the Court knows we have dealt with people before and they negotiated this deal in good faith. Lou Simon has been doing this for 18 years, and he hammered it out. He is representing [the debtor-in-possession] and in that

> respect, Greycas." (A. 214, 218-219) (emphasis added).

No lawyer in the courtroom at the lease approval hearing objected to any of these representations, including the representations regarding the agreement reached at the previous month's meeting when all of the parties agreed that the petitioners would be the leasing agent for the aircraft. Counsel for the secured lender, Greycas, Inc., knew how to object, however, when they felt it appropriate to do so. (A. 204) (see subsequent opinion of Bankruptcy Court, A. 1556; 59 B.R. at 772).

Bankruptcy Judge Gibson approved the Aloha lease by order of Court on November 30, 1984. No party appealed that order. Indeed, the secured lender's attorneys told the Bankruptcy Court that the lease should go forward:

> MR. BARENHOLTZ: Your Honor, speaking for Greycas, we fully desire to cooperate with the Debtor and with any third parties who wish to deal with the Debtor-In-Possession. We do not wish to upset this particular deal or any deals in general of the Debtor-In-Possession.
>
> . . . .
>
> MR. EPSTEIN: Someone said, "Welcome to Bankruptcy." Your Honor, I think Greycas' position with respect to the use of the proceeds under the lease, we want to see the lease get done (A. 189-190, 2843) (emphasis added).

The parties to this proceeding believe the Aloha lease payments will cover the Greycas mortgage on the aircraft (A. 560; 647). Mr. Uhl, the president of the lease company, candidly conceded that the approximate $6 million residual value for the aircraft at the conclusion of the Aloha lease, projected by the recognized source in the aircraft industry, would result in all parties to

this proceeding being paid (A. 689-690, 695-696, 716-717; 793).

Two months after petitioners procured the Aloha lease, and Bankruptcy Judge Gibson approved that lease, the lease company prepared a list of "priority and administrative amounts payable." (A. 1696-1698). That list was transmitted to Greycas and other interested parties to this proceeding, and was represented to include **"amounts now due as priority and administrative claims and expenses."** (A. 668-669; 672-673; 1696-1697). The amount listed as due to petitioner S-J Financial Corporation as a priority, administrative expense is **"$450,000"**, the amount mandated by Mr. Simon's regular commission percentage (A. 1344-1345; 1697). While certain individuals proposed in writing to pay Mr. Simon in

installments, the total amount of commission due was recognized to be $450,000.

After Aloha Airlines took possession of the aircraft at the end of 1984 under its lease, the owner and the lease company again asked their appraiser to appraise the aircraft. This time, however, he was appraising the aircraft in the airworthy condition attributable to Mr. Simon's efforts and negotiations with Aloha Airlines. Significantly, the appraiser appraised the fair market value of the aircraft at $6,500,000 in its airworthy condition (A. 1500-1501). Therefore, Mr. Simon's efforts from July, 1984 to December, 1984, resulted in a damaged asset increasing in value from $5,242,000 "where is - as is," to a value of $6,500,000 under FAA certificate with a solvent airline: a difference and

benefit of $1,258,000. (A. 1437-1458). That increased asset value was an additional benefit to the $10,800,000 lease rental stream petitioners obtained.

The lease company promised to file a reorganization plan after the aircraft lease was approved. But that debtor-in-possession instead filed several motions in the Bankruptcy Court requesting a continuance of the time to file a reorganization plan (A. 421). When no such plan was forthcoming, the petitioners filed a petition for compensation under §503 of the Bankruptcy Code, 11 U.S.C. §503. Petitioners principally relied on §503(b)(1)(A), which authorizes the payment of "commissions" for "preserving the estate." The owner, debtor-in-possession and the secured lender asserted, as a defense to that request

for payment, that petitioners were professional persons, who could only possibly qualify for compensation under §330 and 503(b)(2) of the Code. The reason they asserted that defense was that, in their view, the Third Circuit, at that time, enforced a strict per se rule against compensating professional persons without the entry of a court order approving the professional person's employment before servcies were rendered. In response to that defense, the Bankruptcy Court found that it was the fault of the debtor-in-possession that such a prior order was not entered, and therefore ordered petitioners' employment approved, nunc pro tunc. The Bankruptcy Court also awarded petitioners compensation of $450,000, In the Matter of F/S Airlease, II, Inc., 59 B.R. 769

(Bkrtcy. W.D. Pa. 1986), and further found, inter alia, the following:

> ". . . it must be realized that the total amount brought into the estate by this lease, which is $10,800,000.00 over the course of the 10-year lease, is the sole asset of the Debtor's estate. Were it not for the efforts of S-J in obtaining this lease, there would be no estate with which a reorganization could be effected. Additionally, it should be recognized that the aircraft in question was not in airworthy condition at the time the lease was procured. The leasing of an aircraft with only one of two engines must be considered a difficult deal to arrange. Given the fact that S-J was able to convince Aloha, a highly reputable airline, to lease said aircraft and also to supply the additional, necessary engine without any rental rebate, shows this Court that S-J possesses a high level of skill and expertise in this field." 59 B.R. at 777; (emphasis added).

Bankruptcy Judge Markovitz, who presided over the trial of this matter after the death of Bankruptcy Judge Gibson, also found that Judge Gibson

"...was aware from early in these proceedings that [the petitioner] was involved in the releasing and remarketing of the aircraft," and that at the lease approval hearing before Judge Gibson, which was later on in these bankruptcy reorganization proceedings, "...the parties made the Court aware that the debtor had requested [the petitioner] to procure a lease, that [the petitioner] had procured same, and that Greycas, [the secured lender] while nominally objecting to [the petitioner's] involvement, wanted the lease, secured by [the petitioner] to be approved." In re F/S Airlease II, Inc., 59 B.R. 769 (Bankr.W.D.Pa. 1986). Because these matters were not set forth in a court order, due to the fault of the debtor-in-possession, Bankruptcy Judge Markovitz entered an order of employment, nunc pro tunc. Id.

The owner of the aircraft, the debtor-in-possession and the secured lender appealed the judgment of the Bankruptcy Court. The District Court affirmed the nunc pro tunc employment order, but vacated the $450,000 commission awarded to petitioners and remanded for further documentation of petitioners' time expended in obtaining the aircraft lease. In Re F/S Airlease II, Inc., 84 B.R. 389 (W.D. Pa. 1986).

Thereafter, the owner, debtor-in-possession and secured lender appealed to the court of appeals. The petitioners cross-appealed the vacatur of their monetary award. The Court of Appeals for the Third Circuit reversed the Bankruptcy Court and the District Court on the employment issue, and held that the petitioners are entitled to no compensation, because petitioners'

employment was not set forth in a court order before petitioners performed the services in question. F/S Airlease II, Inc. v. Simon, 844 F.2d 99 (3rd Cir. 1988). The opinion agrees that the statutory responsibility for obtaining such a prior order belonged tohthedebtor-in-possession, not the petitioners. The opinion also recognizes that the debtor-in-possession admitted, and the Bankruptcy Court found as a fact, that the failure to obtain the prior approval order was due to an oversight of the debtor-in-possession. Nevertheless, the opinion decided, without any support in the words of the Bankruptcy Code, or its legislative history, that the petitioners were under a federal legal duty to somehow see to it that the debtor-in-possession complied with its statutory obligation to obtain court

approval of petitioners' employment. And even though the Court of Appeals recognized that it was reaching a "harsh result" where "some unjust enrichment" may be involved, that court nevertheless concluded that it should visit such consequences on petitioners in order to preserve a "bright-line position" on the failure to obtain "prior" court approval.

REASONS FOR GRANTING THE WRIT

I. Significance Of The Case

The interaction of the particular Bankruptcy Code sections involved in this case is not a mere technical matter. Rather, the issues raised in this case go to the very essence of the Bankruptcy Code, and are of great importance to the administration of that Code throughout the Federal Judicial System. The purpose of the Chapter 11 reorganization provisions of the Code, and the operation thereunder of a business undergoing reorganization by a debtor-in-possession, is to accomplish the rejuvenation of a financially troubled enterprise. Congress recognized that, if an insolvent business is to be reorganized and rehabilitated, third

parties must be willing to provide the necessary services and goods to bring about that rehabilitation. Because such parties will not provide the necessary services to an insolvent debtor-in-possession absent a statutory compensation incentive, Congress set out a series of priority compensation remedies under the various subsections of §503 of the Bankruptcy Code. Third parties whose claims come within one of those remedial subsections are accorded a priority over the claims of pre-petition debts and liabilities of the debtor-in-possession. It is undeniable, however, that the debtor-in-possession is carrying on the business for the benefit of the pre-filing creditors and therefore fairness requires that any claims incident to the debtor-in-possession's operation of the business post-petition

should be paid before those of the pre-petition creditors for whose benefit the continued operation of the business was allowed. See generally, In re Mammoth Mart, Inc., 536 F.2d 950, 954 (1st Cir. 1976).

The opinion of the Third Circuit in this case sends an unmistakable message to business people such as the petitioners that their efforts to rehabilitate insolvent debtors-in-possession are undertaken at their own peril. Rather than provide an incentive to induce business people to assist in rehabilitating insolvent businesses, the Court of Appeals, with its admittedly "harsh result" has built in a disincentive. The Court of Appeals places business people in the hands of bankruptcy litigators, bankruptcy lawyers and bankruptcy administrators, and

compels business people to retain private counsel and fend for themselves in adversary proceedings in the Bankruptcy Court if they desire to do business with an insolvent debtor-in-possession and be compensated for such an effort.

The foregoing result not only frustrates the congressional desire to induce business people to participate in the rehabilitation of insolvent businesses, but it is also directly contrary to the congressional intent to wrestle control of bankruptcy cases from bankruptcy attorneys and the "bankruptcy ring." Indeed, the House Report on the Bankruptcy Code specifically criticizes such control and states that "in practice . . . the bankruptcy system operates more for the benefit of attorneys than for the benefit of creditors." H.R. No 595, 95th

Cong., 2d Sess. 92, reprinted in 1978 U.S. Code Cong. & Ad. News 5787, 5963, 6053.

This legislative history shows unmistakably that the Congress did not want bankruptcy cases pursued for the benefit of bankruptcy lawyers who administrate bankruptcy estates. Yet the Court of Appeals in this case has rewarded the bankruptcy attorneys who failed to obtain what the court of appeals later deemed to be the requisite court approval and court order approving the petitioner's employment. Those bankruptcy lawyers submitted fee petitions for hundreds of thousands of dollars, seeking compensation for litigating the issues their own inaction created prior to petitioners' request for compensation (A. 330, 1141, 1509). If the opinion of the Court of Appeals

stands, then the bankruptcy lawyers will be paid huge fees out of the lease proceeds generated by the petitioners, and the petitioners will receive nothing but a lesson to stay away from the Bankruptcy Court.

The significance of this state of affairs transcends the "unjust enrichment" that the Court of Appeals acknowledged would be granted to the owner, secured lender and lease company of the aircraft who decided to rely on the petitioners, rather than upon themselves, to obtain the repair of the damaged aircraft and a new lessee for that aircraft. The opinion of the Third Circuit sends a message to the business community that the bankruptcy lawyers and "bankruptcy ring" still control the rehabilitation of insolvent businesses in the Bankruptcy Court. Any business

person that places himself or herself in their hands is either at their mercy or obligated to undertake a litigious, adversary proceeding in order to do business with the insolvent debtor-in-possession. This, of course, will further multiply the fees of bankruptcy lawyers and dissipate bankruptcy estates. It is hard to imagine how a single opinion in a bankruptcy case could more effectively frustrate congressional intent and objectives and portend failure in the rehabilitation of insolvent businesses.

II. The Opinion Of The Court Of Appeals Renders A Section Of The Bankruptcy Code Inoperative And Is Therefore Contrary To The Decisions Of This Court.

The opinion of the Third Circuit concluded that to enforce the literal terms of §503(b)(1)(A) of the Bankruptcy

Code, 11 U.S. C. §503(b)(1)(A), would "circumvent" the professional person sections of the Bankruptcy Code, render them "nugatory" and destroy Congress' prior approval requirement. The opinion did not analyze the significance of Congress' omission of the word prior from its "approval" requirement. Nor did the opinion consider that its conclusion rendered §503(b)(1)(A) nugatory instead, at the same time that the court was supposedly trying to avoid making the judicially constructed prior approval requirement "nugatory." The court of appeals' approach, therefore, elevated a judicial construct (the prior approval requirement) over the specific words chosen by Congress in §503(b)(1)(A).

There is no doubt that petitioners sought "commissions" and that the Bankruptcy Court found that petitioners

"preserved" the sole property of the estate. The literal terms of §503(b)(1)(A) authorize the payment of "commissions" for "preserving the property" of the estate. The court of appeals nevertheless decided that it would not enforce §503(b)(1)(A), because the court felt that enforcement of Congress' words, as written, would "circumvent" the professional person approval sections and render them "nugatory." F/S Airlease II, Inc. v. Simon, 844 F.2d 99, 109 (3rd Cir. 1988).

The court of appeals' opinion ignored, however, the well settled rule that the interpretation of a statute begins with the language chosen by Congress. Blue Chip Stamps v. Manor Drug Stores, 420 U.S. 723, 756 (1975) (J. Powell, concurring).

Section 503(b)(1)(A) of the Bankruptcy Code, 11 U.S.C. §503(b)(1)(A), provides in relevant part:

> §503. Allowance of administrative expenses . . .
>
> (b) After notice and a hearing, there shall be allowed administrative expenses. . ., <u>including</u>
>
> > (1)(A) the actual, necessary costs and expenses of <u>preserving the estate, including</u> wages, salaries, or <u>commissions for services rendered</u> after the commencement of the case; (emphasis added).

Congress' intent in enacting §503(b)(1)(A) was elaborately discussed in <u>Trustees of Amalgamated Ins. Fund v. McFarlin's</u>, 789 F.2d 98, 101 (2nd Cir. 1986), as follows:

> Section 507 gives first priority to "administrative expenses allowed under [11 U.S.C.] section 503(b)." Section 503(b)(1)(A) defines administrative expenses as including "the actual, necessary costs and expenses of

> preserving the estate, including wages, salaries or commissions for services rendered after the commencement of the case."
>
> . . . .
>
> Congress granted priority to administrative expenses in order to facilitate the efforts of the trustee or debtor in possession to rehabilitate the business for the benefit of all the estate's creditors. . . Congress reasoned that unless the debts incurred by the debtor in possession could be given priority over the debts which forced the estate into bankruptcy in the first place, persons would not do business with the debtor in possession, which would inhibit rehabilitation of the business and thus harm the creditors." (citations omitted).

There is no evidence that Congress intended the professional person sections of the Bankruptcy Code to operate to the exclusion of §503(b)(1)(A) or other Code sections. Neither the words used in the Bankruptcy Code nor the legislative history preceding its passage suggest

such a construction. Given the total absence of any congressional intent to support its construction, the court of appeals should have heeded this Court's rule of construction in bankruptcy cases involving predecessor statutory sections: "there is nothing impossible about construing the sections here involved to mean what they say. . ." Reading Company v. Brown, 391 U.S. 471, 481 (1968); Otte v. United States, 419 U.S. 43, 57 (1974).

The opinion of the court of appeals concluded that it must reach a "harsh" result in order to preserve a "bright-line position" under the Bankruptcy Code. This approach to statutory construction in bankruptcy cases is directly contrary to time-honored decisions of this Court that posited an equitable, rather than a technical, method of construction. Thus,

in Pepper v. Litton, 308 U.S. 295, 304-305 (1939), this Court stated:

> "The bankruptcy courts have exercised these equitable powers in passing on a wide range of problems arising out of the administration of bankrupt estates. They have been invoked to the end that fraud will not prevail, that substance will not give way to form, that technical considerations will not prevent substantial justice from being done."

Indeed, when confronted with a technical statutory argument under the Bankruptcy Act, this Court held in Bank of Marin v. England, 385 U.S. 99, 103 (1966), as follows:

> ". . . we do not read these statutory words with the ease of a computer. There is an overriding consideration that equitable principles govern the exercise of bankruptcy jurisdiction.

The court of appeals similarly ignored the fundamental rule of statutory construction, embodied in

numerous decisions of this Court, that each provision of a statute should be enforced, and that judicial construction should not render a statutory section inoperative, as was done here. Mountain States Tel. & Tel. v. Pueblo of Santa Ana, 472 U.S. 237, 249 (1985); Colautti v. Franklin, 439 U.S. 379, 392 (1979); Jarecki v. G.D. Searle & Co., 367 U.S. 303, 307-308 (1961). This Court in United States v. Menasche, 348 U.S. 528-538-539 (1955), described and condemned the type of statutory interpretation used by the court of appeals in this case:

> "The cardinal principle of statutory construction is to save and not to destroy." It is our duty "to give effect, if possible, to every clause and word of a statute," rather than to emasculate an entire section. . ." (citations omitted).

The court of appeals' opinion recognized that petitioners' compensation

constituted a "commission." 844 F.2d 101. But that opinion does not explain why such a "commission" cannot be recovered under a statutory provision that authorizes the recovery of "commissions." Instead, the opinion simply announced its ipse dixit that petitioners could not rely on §503(b)(1)(A) because the professional person compensation provision, §503(b)(2), is, according to that court, the exclusive remedy for petitioners.

Giving preclusive effect to one compensation section does not, however, further the intent of Congress where, as here, Congress did not make the applicability of one section exclusive of the applicability of other Code sections. Congress specifically evidenced its intent against exclusivity when it used the word "including" as a preface to the

subsections of §503(b), and then defined "including" in 11 U.S.C. §102 as "not limiting."

The court of appeals was obviously concerned that professional persons who administrate bankruptcy cases, such as attorneys or accountants, could possibly look to §503(b)(1)(A) and thereby avoid the professional person approval and compensation requirements of §§327(a), 330(a) and 503(b)(2). But it is hard to see how attorneys or accountants would necessarily be successful if they asserted that their fees were "wages, salaries, or commissions" for "preserving the estate." In any event, it is harder to see how the parade of horribles approach adopted by the court of appeals

justifies ignoring the specific words and provisions enacted by Congress.[4]

III. The Court Of Appeals' Decision to Render §503(b)(1)(A) Inoperative Creates A Conflict Among The Circuits.

The opinion of the Third Circuit also conflicts with the opinion of the Fourth Circuit in Goodman v. Philip R. Curtis Enterprises, Inc., 809 F.2d 228, 231 at n. 4 (4th Cir. 1987). The Fourth Circuit concluded that attorney's fees may be recoverable under §503(b)(1)(A). Because attorneys are specifically stated

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4. The court of appeals implied that petitioners' right to remarket the aircraft created an issue on "disinterestedness," 844 F.2d at 101, 106, because the breach of that right could have created a pre-petition claim. Of courtse, the parties agreed for Simon to remarket post-petition. Hence there was no breach that could have led to such a claim.

to be professional persons under §327(a) of the Bankruptcy Code, the opinion of the Fourth Circuit in the Goodman case stands for the proposition that professional persons may indeed be compensated under §503(b)(1)(A).

In further contrast to the holding of the court of appeals in this case, other federal courts have recognized that §503(b)(1)(A) applies to persons who might also qualify for employment as professional persons under §327(a). Thus, in the case of In re Ewing 54 B.R. 952, 956 (D. Col.), the District Court held:

> ". . . this case is remanded to the bankruptcy court for determination of whether [the broker] is entitled to payment of an administrative expense pursuant to 11 U.S.C. §503. If the Court determines that [the broker] is entitled to payment of an administrative expense, it does not need to appoint him broker nunc pro tunc. It only

needs to pay him pursuant to 11 U.S.C. §503."

As discussed at length throughout this Petition, these conflicts are not mere technical conflicts. This Court granted certiorari in the Reading Company case ". . . because the issue is important in the administration of the bankruptcy laws and is one of first impression in this Court." 391 U.S. at 475. Petitioners request this Court to grant review in this case for the same reasons.

IV. Petitioners Should Not Be Precluded From Employment And Compensation By An Estate That They Rehabilitated.

Both the Bankruptcy Court and the District Court found that the debtor-in-possession was at fault for failing to obtain court approval of petitioners' employment prior to petitioners' procurement and negotiation of the court-

approved aircraft lease. Both the Bankruptcy Court and the District Court ordered the approval of petitioners' employment, nunc pro tunc. Those orders fell within the exact words chosen by Congress, because Bankruptcy Rule 2014(a) requires the trustee or debtor-in-possession to seek an "order of approval," and §327(a) of the Code requires employment "with the Court's approval," but does not mandate prior approval.

The Court of Appeals reversed the orders of the Bankruptcy Court and the District Court for what it characterized as "legal error." 844 F.2d at 107. It ruled, without any support in the Bankruptcy Code or its legislative history, that petitioners were under a federal legal duty "to insure" that "prior approval" had been sought and

obtained. Id. It further ruled that petitioners were guilty of "extreme laxity in seeking approval" because they filed their petition for payment or compensation seven months after concluding their services. Id.

The court of appeals confused a petition for "approval" of employment under §327(a), and Bankruptcy Rule 2014(a), with a petition for compensation under §503. A petition for approval may only be brought by the trustee or debtor-in-possession. In contrast, any "person" or "entity may file a request for payment of an administrative expense." 11 U.S.C. §§101(14), 503(a) (emphasis added).

Petitioners invoked the "payment" procedure, and the debtor-in-possession failed to invoke the "approval" procedure. When the debtor-in-possession raised its own inaction as a defense to

petitioners' request for "payment," the Bankruptcy Court and the District Court granted the statutorily required "court's approval" to petitioners' efforts. Accordingly, petitioners did not delay in petitioning for approval of their employment because only the debtor-in-possession is statutorily required to file such a petition. Petitioners properly filed a petition for payment when the promised reorganization plan was not forthcoming.

The court of appeals purported to apply an "extraordinary circumstances" test to petitioners' retroactive approval. 844 F.2d at 105. This test emanated from its prior opinion in In re Arkansas Co., Inc., 798 F.2d 645 (3rd Cir. 1986). While this test supposedly springs from equitable considerations, it is clear that it has no statutory basis.

Moreover, its application to this case certainly failed to lead to an equitable result. A focus on Congress' actual words and provisions shows that the "extraordinary circumstances" test is nothing but an articfical judicial construct designed to foreclose retroactive approval of employment, no matter how beneficial the services in question happened to be.

The professional person sections of the Bankruptcy Code, 11 U.S.C. §§327(a), 330(a) and 503(b)(2), provide in relevant part as follows:

> §327. **Employment of professional persons.**
>
> (a) Except as otherwise provided in this section, the trustee,[5] with the court's approval, may employ one or more attorneys, accountants,

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[5]. The debtor-in-possession has the powers of a trustee under 11 U.S.C. §1107(a).

appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.

§330. **Compensation of officers.**

(a) After notice and hearing, . . . the court may award to a trustee, [or] to . . . a professional person employed under section 327 or 1103 of this title,

(1) reasonable compensation for actual, necessary services rendered by such . . . professional person, . . . based on the nature, the extent, and the value of such services, the time spent on such services, and the cost of comparable services other than a case under this title; and

(2) reimbursement for actual, necessary expenses.

* * *

§503. **Allowances of administrative expenses.**

(a) * * *

> (b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including ---
>
> * * *
>
> (2) compensation and reimbursement awarded under section 330(a) of this title; (emphasis added)

The foregoing professional person sections allow "compensation" to be paid to approved professionals. These sections do not require prior approval, and should not be used, as the court of appeals did here, to bar compensation for business people who rehabilitate an insolvent business.

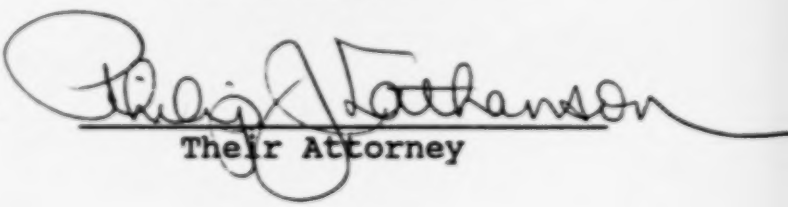
Nor should they be deemed sole and exclusive remedies. The court of appeals did not explain why the payment of "commissions" to leasing agents under §503(b)(1)(A) for "preserving the property" of the estate would render "nugatory" the professional person

sections allowing "reasonable compensation . . . based on the nature, the extent, and the value of such services . . ." to be recovered by court approved professionals. These statutory provisions are, on their own terms, reconcilable, not contradictory. Paying a "commission" to a leasing agent is not inconsistent with compensating a lawyer or accountant for his time on an hourly basis.

V. Conclusion

For each and all of the foregoing reasons, petitioners Lewis Simon and S-J Financial Corporation respectfully request this Court to issue a writ of certiorari to the United States Court of Appeals for the Third Circuit and thereafter to reverse that court's opinion and judgment in this matter.

LEWIS SIMON and
S-J FINANCIAL
CORPORATION

By: 
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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 86-3712, 86-3715, 86-3718, and 86-3731

IN RE: F/S AIRLEASE II, INC.

v.

LEWIS SIMON and S-J CORPORATION
GREYCAS, INC.,

Appellant in No. 86-3712

THE SWIG INVESTMENT COMPANY
AIRCRAFT TRUST NO. 1, one of
the creditors above named in
this bankruptcy proceeding,

Appellant in No. 86-3715

F/S AIRLEASE II, INC.,
appellant-debtor above named,

Appellant in No. 86-3718

LEWIS SIMON and S-J
FINANCIAL CORPORATION,

Appellants in No. 86-3731

On Appeal from the United States District
Court for the Western District
of Pennsylvania
(D.C. Civil No. 86-1047)

NOS. 86-3713, 86-3716, 86-3719 and 86-3732

IN RE: F/S AIRLEASE II, INC.

v.

GREYCAS, INC.

Appellant in No. 86-3713

THE SWIG INVESTMENT COMPANY AIRCRAFT TRUST NO. 1, one of the creditors above named in this bankruptcy proceeding,

Appellant in No. 86-3716

F/S AIRLEASE II, INC., appellant-debtor above named,

Appellant in No. 86-3719

LEWIS SIMON and S-J FINANCIAL CORPORATION,

Appellants in No. 86-3732

On Appeal from the United States District Court for the Western District of Pennsylvania
(D.C. Civil No. 86-1048)

NOS. 86-3714, 86-3717, 86-3720 and 86-3733

F/S AIRLEASE II, INC.

v.

SWIG INVESTMENT COMPANY,
GREYCAS, INC.,

Appellant in No. 86-3714

THE SWIG INVESTMENT COMPANY
AIRCRAFT TRUST NO. 1, one of the
creditors above named in this
bankruptcy proceeding,

Appellant in No. 86-3717

F/S AIRLEASE II, INC.,
appellant-debtor above named,

Appellant in No. 86-3720

LEWIS SIMON and S-J
FINANCIAL CORPORATION,

Appellants in No. 86-3733

On Appeal from the United States District
Court for the Western District
of Pennsylvania
(D.C. Civil No. 86-1050)

Argued September 9, 1987

Before: SLOVITER and STAPLETON, *Circuit Judges*, and FISHER, *District Judge**

(Opinion filed March 21, 1988)

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* Hon. Clarkson S. Fisher, Chief Judge, United States District Court for the District of New Jersey, sitting by designation.

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OPINION OF THE COURT

SLOVITER, *Circuit Judge*.

The debtor in a Chapter 11 bankruptcy and its two principal creditors appeal from an order of the district court affirming the bankruptcy court's *nunc pro tunc* appointment of a broker for professional services rendered to debtor. The broker cross-appeals from that portion of the district court's order vacating the bankruptcy court's monetary award and remanding the case to the bankruptcy court for recalculation of the amount due the broker. We must first decide whether we have jurisdiction. If so, we will reach the issue whether this case presents such "extraordinary circumstances" as set forth in *In re Arkansas*, 798 F.2d 645 (3d Cir. 1986), to warrant non-compliance with the prior approval rule of section 327(a) of Chapter 11 of the Bankruptcy Code.

I.

Facts

F/S AirLease II, Inc. is a Delaware corporation engaged solely in the business of buying, selling, financing, and leasing a Boeing airplane. It purchased that plane in 1980 and then leased it to Air Florida for a ten-year term. Greycas, Inc. provided the financing for that transaction; its interest in the plane was secured by a first mortgage, and Greycas also was entitled to an

assignment of rental proceeds from the Air Florida lease as partial security. In 1980, AirLease sold the plane to Comet Leasing Corporation, which then sold it to Swig Investment Company, which in turn leased it back to AirLease for an eighteen-year term. These transactions were each carried out subject to Greycas' security interest.

The Air Florida lease had been negotiated and procured for AirLease by Lewis Simon, a broker who does business through S-J Financial Corporation (collectively referred to as "Simon"), and who performed brokerage services for AirLease's affiliated companies as well. As a result of a dispute over commissions, Simon sued AirLease's parent corporation to obtain commissions allegedly due for, *inter alia*, his brokerage services in obtaining the Air Florida lease. A settlement agreement was reached in May of 1983 which gave Simon "the exclusive right to remarket" the Boeing aircraft, subject to the rights of the owner and other creditors, for a commission of one-half of one month's rent for each year of the re-leasing term, net of expenses.

In July 1984, Air Florida filed for bankruptcy under Chapter 11 of the Bankruptcy Code, thereby terminating its lease with AirLease and depriving AirLease of its sole source of income to satisfy its obligations to Swig and Greycas. According to an appraisal conducted at that time by AirLease's appraiser, the plane, which was missing one of its two engines, was valued at $5,242,000 and would require $763,500 worth of repairs to restore it to an airworthy condition.

Upon Air Florida's bankruptcy, AirLease immediately contacted Simon and enlisted his services for the remarketing of the plane. In response, on July 20, 1984, Simon wrote a letter to AirLease's Vice President and Treasurer, offering to remarket the

plane for a flat fee of $100,000, net of expenses, "in lieu of the re-leasing fee set forth in [the May 1983 settlement agreement]." App. at 1664. This letter also requested a $20,000 advance from AirLease to cover expenses. On July 23, 1984, AirLease responded with a letter proposing additional terms and enclosing both a check for $20,000 and an escrow agreement.

In a second letter to AirLease, dated July 30, 1984, Simon confirmed that he would undertake to remarket the plane for a $100,000 flat fee. Simon also stated that he understood that AirLease would use its best efforts to obtain Swig's agreement to pay him the $100,000 fee if he was successful in releasing the plane. Simon made this offer on the condition that he be notified of Swig's decision by August 3, 1984. AirLease accepted Simon's July 30, 1984 offer on August 21, 1984, but apparently Swig did not consent to this arrangement.

On August 3, 1984, AirLease filed a voluntary bankruptcy petition under Chapter 11 of the Bankruptcy Code. Greycas, the first mortgagee, asserted that it had a right to possession of the plane; on August 30, 1984, the bankruptcy court enjoined Greycas from instituting any action to obtain possession of the plane other than in AirLease's bankruptcy proceedings. The bankruptcy court subsequently awarded possession of the plane to AirLease and Greycas jointly.

Throughout the months of September and October 1984, Simon attempted to remarket the plane. At this time Greycas also was attempting to secure a new lessee, and Greycas did, in fact, make a proposal to America West Airlines which did not culminate in an agreement.

Thereafter, Simon reached an agreement with Aloha Airlines, which was memorialized in a letter agreement dated October 25, 1984, and finalized in a lease agreement at the end of November. That agreement provided for a ten-year lease term, with

monthly rental payments of $90,000. The agreement further provided that Aloha would furnish the necessary engine at its own expense, and would return the plane to AirLease at the end of the lease term with two operable engines. The deal was contingent on the lease being executed by mid-December 1984, because the December holiday season was Aloha's busiest time.

AirLease quickly filed a motion in the bankruptcy court for approval of the lease to Air Florida. On the day before the bankruptcy court was to hold a hearing on the motion, counsel for Simon, in a letter dated November 28, 1984 to counsel for AirLease, confirmed his understanding reached in a telephone conversation between them that day that in the forthcoming bankruptcy court hearings AirLease would not seek to obtain any ruling from the bankruptcy court "regarding the distribution or allocation of the proceeds from the Aloha Airlines lease," but, rather, would only seek approval of the lease itself. App. at 792. The issue of "allocation and distribution of the payment derived from the lease [was to] be resolved at a later date." However, Simon understood that AirLease would "spread of record and include in any order approving the lease the fact that [Simon] initiated, procured and negotiated the Aloha Airlines lease." App. at 792.

After two days of hearings held on November 29 and 30, 1984, at which AirLease "spread of record" Simon's role in the transaction, the bankruptcy court approved the Aloha lease over Greycas' objections, finding it to be in the estate's best interests. Simon testified at the hearing about the lease; however, he did not seek his appointment as broker or approval of his services at that time. Rather, as Simon and AirLease had agreed, the sole issue raised at that hearing was the confirmation of the lease.

In June 1985, ten months after he began his efforts to remarket the plane and seven months after the Aloha lease was executed and approved by the bankruptcy court, Simon filed a petition in the bankruptcy court for payment of administrative expenses pursuant to 11 U.S.C. § 503 (1982 & Supp. IV 1986). He requested $450,000, which amounted to one-half of one month's rent for each year of the Aloha lease. The bankruptcy court approved his employment *nunc pro tunc* and awarded him the $450,000 fee he requested. *In re F/S AirLease II, Inc.*, 59 B.R. 769 (Bankr. W.D. Pa. 1986).

AirLease, Greycas, and Swig appealed to the district court which affirmed the *nunc pro tunc* approval of Simon's appointment but vacated the $450,000 award, finding the amount to be insufficiently substantiated. The district court therefore remanded the case to the bankruptcy court on the issue of the amount of the award. *In re F/S AirLease II, Inc.*, Nos. 86-1047, 86-1048, 86-1050 (W.D. Pa. October 21, 1986). These appeals followed.[1]

We review the bankruptcy court's ruling by the same standards the district court should apply. *Universal Minerals, Inc. v. C.A. Hughes & Co.*, 669 F.2d 98, 102 (3d Cir. 1981). District court review of the bankruptcy court's factual findings is under the "clearly erroneous" standard. *See In re Baron v. Allied Artists Pictures Corp.*, 717 F.2d 100 (3d Cir. 1983); *see also Universal Minerals*, 669 F.2d at 102. A decision to grant *nunc pro tunc* approval is in the discretion of

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1. AirLease and Swig appeal from so much of the district court's order that affirms the bankruptcy court's *nunc pro tunc* approval; Greycas appeals from both the *nunc pro tunc* approval and the remand; and Simon cross-appeals from that portion of the order vacating the monetary award and remanding the case to the bankruptcy court.

the bankruptcy court, *see Arkansas*, 798 F.2d at 650, and is reviewed for abuse of discretion only. We have plenary review over legal questions. *See Universal Minerals*, 669 F.2d at 102.

II.

Appealability

All parties construe 28 U.S.C. § 158(d) (Supp. III 1985)[2] as giving us jurisdiction. We are obliged, however, in every appeal presented to us to satisfy ourselves not only of our jurisdiction but also of the jurisdiction of the lower court. *Bender v. Williamsport Area School District*, 475 U.S. 534, 541 (1986); *see also In re Walsh Trucking Co.*, No. 86-5811 (3d Cir. Feb. 2, 1988).

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2. Section 158(d) of title 28 of the United States Code provides that:

> The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section.

28 U.S.C. § 158(d) (Supp. III 1985).

Subsection (a) of section 158 provides, in turn, that:

> The district courts of the United States shall have jurisdiction to hear appeals from final judgments, orders, and decrees, and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

28 U.S.C. § 158(a) (Supp. III 1985). Subsection (b) of section 158, governing appeals from bankruptcy appellate panels, is not relevant here.

Courts of appeals have jurisdiction over appeals in bankruptcy cases in which district courts have entered "final decisions, judgments, orders, and decrees." 28 U.S.C. § 158(d); *see In re Brown*, 803 F.2d 120, 122 (3d Cir. 1986). District courts, on the other hand, have jurisdiction not only over such final judgments but also, "with leave of the court," over interlocutory orders and decrees. 28 U.S.C. § 158(a). In this case, no motion was filed for leave to appeal an interlocutory order, *see* Bankruptcy Rule 8001(b), and thus it appears that the district court and the parties treated the bankruptcy court's order as final.

The unique characteristics of bankruptcy cases have led us to "consistently consider[] finality in a more pragmatic and less technical way in bankruptcy cases than in other situations." *In re Amatex Corp.*, 755 F.2d 1034, 1039 (3d Cir. 1985).[3] We have explained that "[b]ankruptcy cases frequently involve protracted proceedings with many parties participating. To avoid the waste of time and resources that might result from reviewing discrete portions of the action only after a

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3. Prior to 1984, the jurisdiction of the courts of appeals in bankruptcy cases was governed by 28 U.S.C. § 1293(b), (omitted by Pub. L. 98-353, tit. I, § 113, 98 Stat. 333, 343 (1984)), which provided that courts of appeals had jurisdiction "from a final judgment, order, or decree of a bankruptcy court." This provision was superseded by section 158(d) when Congress enacted the Bankruptcy Amendments & Federal Judgeship Act of 1984, Pub. L. No. 98-353, tit. I, § 104(a), 98 Stat. 333, 341 (1984), in response to the Supreme Court's decision in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982). Because both statutes contain the finality requirement, this court has stated that Congress did not intend any substantive change when it enacted section 158(d), and, indeed, the legislative history reveals none. In re Pacor, Inc., 743 F.2d 984, 987 n.4 (3d Cir. 1984). We may therefore rely on cases decided under section 1293(b) to assess our jurisdiction under section 158(d). *See* In re Brown, 803 F.2d 120, 122 n.3 (3d Cir. 1986).

plan of reorganization is approved, courts have permitted appellate review of orders that in other contexts might be considered interlocutory." *Id.* at 1039. The factors that we have considered in making a decision on finality have included the impact of the matter on the assets of the bankruptcy estate, the preclusive effect of a decision on the merits, and whether the interests of judicial economy will be furthered. *See, e.g., In re Meyertech*, 831 F.2d 410, 414 (3d Cir. 1987).

Applying these factors, we have found the requisite finality in an order denying a right to appoint a legal representative for potential future claimants, *In re Amatex Corp.*, 755 F.2d at 1039-41; an order lifting the automatic stay of the bankruptcy code, *In re Comer*, 716 F.2d 168, 171-74 (3d Cir. 1983); an order staying proceedings pending action by a state agency, *Wheeling-Pittsburgh Steel Corp. v. McCune*, 836 F.2d 153, 157-58 (3d Cir. 1987); an order denying the creditors' motion to dismiss the debtor's Chapter 7 petition, *In re Christian*, 804 F.2d 46, 47-48 (3d Cir. 1986); and an order granting a creditors committee leave to intervene in an adversary proceeding brought by the bankruptcy trustee in a Chapter 11 proceeding, *In re Marin Motor Oil, Inc.*, 689 F.2d 445, 447-49 (3d Cir. 1982), *cert. denied*, 459 U.S. 1207 (1983). *See also In re Walsh Trucking Co.*, No. 86-5811, slip op. at 4-8 (3d Cir. Jan. 4, 1988) (applying the same analysis to appeals from the bankruptcy court to the district court).

Application of this approach leads to our conclusion in this case that the orders of both the bankruptcy court and the district court granting *nunc pro tunc* approval of Simon's employment as a broker were final. *See In re Arkansas*, 798 F.2d 645 (3d Cir. 1986) (assuming without discussion that a

bankruptcy court order, affirmed by the district court, denying *nunc pro tunc* approval of employment of a law firm under 11 U.S.C. § 327(a) was appealable).

A resolution of this discrete dispute at this time would further the goal of judicial economy because it could obviate the need for further action by the bankruptcy court. Even more important, the order has a significant impact on the assets of the bankruptcy estate; the amount Simon seeks represents a substantial portion of the assets of the estate, and an award to him at this point will severely affect the rights of the other creditors. In fact, a delay in the final resolution of this matter could have an adverse impact on the debtor's successful reorganization under Chapter 11. In letter memoranda submitted to this court in response to its request for briefing on the issue of appealability, AirLease, Greycas, and Swig expressed their belief that the remand of the case to the bankruptcy court and subsequent payment of some fee to Simon could transform this Chapter 11 reorganization into a Chapter 7 involuntary bankruptcy. Richard Uhl, the president of AirLease, testified to that effect in the hearing on Simon's petition for payment of administrative expenses, stating that, "if the available funds were hit as heavily as we are talking about here today . . . there would be no basis for a plan of reorganization." App. at 1343. As we stated *In re Comer*, 716 F.2d at 172, the fact that determination of the disputed issue may require conversion of the procedure from one under Chapter 11 to one under Chapter 7 demonstrated that, "[t]he matter ... is not one that can await final resolution of the bankruptcy proceedings."

The district court's remand of the portion of the bankruptcy court's order dealing with the amount of Simon's compensation does not affect our jurisdiction

over the portion of its order approving Simon's *nunc pro tunc* employment.[4] In *Universal Minerals, Inc. v. C.A. Hughes & Co.*, 669 F.2d 98, 101 (3d Cir. 1981), we held that we could review the district court's determination in an adversary proceeding against the debtor with respect to ownership of a certain coal mine notwithstanding that the district court had remanded to the bankruptcy court for an accounting. *See also In re Meyertech Corp.*, 831 F.2d at 414 (district court order remanding to the bankruptcy court for reconsideration of the amount and propriety of a favorable award in an adversary proceeding is appealable final order). In this case, as in those, "the judgment of the district court conclusively determined the question presented by this appeal." *Universal Minerals*, 669 F.2d at 101.[5] For these reasons, we

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4. One authority has concluded that the issue of whether a court of appeals has jurisdiction over an order of the district court remanding to the bankruptcy court is "hopelessly unresolved." 1 L. King, *Collier on Bankruptcy*, para. 3.03 at 3-176 (15th ed. 1987) (citing cases). This case is unlike those where courts of appeals have dismissed appeals when the district court's remand to the bankruptcy court involved the development of "further factual findings related to a central issue raised on appeal." In re Stanton, 766 F.2d 1283, 1287 (9th Cir. 1985) (citing In re Martinez, 721 F.2d 262, 265 (9th Cir. 1983)); *see also* In re Vekco, 792 F.2d 744 (8th Cir. 1986). *Compare* In re Bowman, 821 F.2d 245, 248 (5th Cir. 1987) (finding no final order when remand involves "significant further proceedings") *with* In re Lift & Equipment Service, Inc., 816 F.2d 1013, 1016 (finding final order when remand involves "no more than a mechanical and ministerial task"), *modified in part on rehearing*, 819 F.2d 546 (5th Cir. 1987).

5. The two instances in which we have dismissed appeals because the district court had remanded are, on close examination, inapposite here. In In re Jeanette Corp., 832 F.2d 43 (3d Cir. 1987), the district court had affirmed the bankruptcy court's order that the debtor's attorney violated Fed. R. Civ. P. 11 and Bankruptcy

conclude that the district court's order approving the *nunc pro tunc* employment of Simon is a final order,[6] and we turn to the merits of the appeal.

III.

Retroactive Approval

A.

Our analysis of whether the bankruptcy court, as affirmed by the district court, properly approved Simon's appointment under section 327(a)[7] *nunc pro tunc* is informed in large measure by our recent decision in *In re Arkansas*, 798 F.2d 645 (3d Cir.

Rule 9011 and remanded for a hearing to determine whether sanctions should be imposed. We dismissed the appeal because the "liberal construction" of finality in bankruptcy proceedings "does not apply in situations unrelated to the special needs of bankruptcy litigation." *Id.* at 45. In In re Brown, 803 F.2d 120 (3d Cir. 1986), the district court had reversed the bankruptcy court's order that a creditor's letter violated the automatic stay of the Code and remanded for a determination of damages due the debtor. We explicitly predicated our dismissal of the appeal on the fact that the district court's order did not "affect the distribution of the debtor's assets or the relationship among the creditors." *Id.* at 123.

6. Because of our resolution of the *nunc pro tunc* employment issue, we have no occasion to reach the issue of the amount of Simon's compensation, which is raised by the cross-appeals. Therefore, we do not decide whether we have jurisdiction over the cross-appeals.

7. 11 U.S.C. § 327(a) (1982) provides that:

> Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.

1986), handed down after the bankruptcy court's decision in this case. In *Arkansas*, we held that "bankruptcy courts may, *in extraordinary circumstances*, grant retroactive approval of professional employment." *Id.* at 646 (emphasis added). We adopted a two-part test to determine the propriety of such retroactive approval: first, the bankruptcy court must find, after a hearing, that the applicant satisfies the disinterestedness requirements of section 327(a) and would therefore have been appointed initially; and, second, the court must, in the exercise of its discretion, determine that the particular circumstances presented are so extraordinary as to warrant retroactive approval. *Id.* at 650.

To guide the bankruptcy court in the exercise of its discretion regarding the existence of "extraordinary circumstances", we directed it to consider such factors as:

> whether the applicant or some other person bore responsibility for applying for approval; whether the applicant was under time pressure to begin service without approval; the amount of delay after the applicant learned that initial approval had not been granted; the extent to which compensation to the applicant will prejudice innocent third parties; and other relevant factors.

Id.

Applying these factors in *Arkansas*, we upheld the district court's decision that no extraordinary circumstances justified the retroactive approval of attorneys for a creditors committee, where the

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Under 11 U.S.C. § 1107(a) (1982), AirLease, as a debtor in possession, has substantially the same rights, powers, functions, and duties of a trustee and is thereby entitled to employ professional persons under section 327(a).

attorneys were experienced in bankruptcy practice and had alleged no time pressure that would justify their failure to apply for approval, but simply, through oversight, had neglected to do so. *Id.* at 650-51. Noting that we had previously stated that the prior approval requirement is a "means of 'ensuring that the court may know the type of individual who is engaged in the proceeding, their integrity, their experience in connection with work of this type, as well as their competency concerning the same,'" *id.* at 648, (quoting *In re Hydrocarbon Chemicals, Inc.*, 411 F.2d 203, 205 (3d Cir.) (in banc), *cert. denied*, 396 U.S. 823 (1969)), we concluded in *Arkansas* that "the prophylactic statutory rule that approval must be sought in advance of performance of services is too strong to be overcome by a mere showing of oversight." *Id.* at 651.

AirLease, Swig, and Greycas contend that Simon would not have met the requirements of section 327(a) for appointment of professionals even had approval of his appointment been sought in a timely fashion.[8] They argue that because Simon has a potential claim against AirLease arising out of his 1983 settlement agreement with AirLease's parent, he is not a "disinterested person" eligible for appointment under section 327(a).[9] Such a dispute demonstrates the

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8. In light of this argument, we find the position of appellants Swig and AirLease that Simon is entitled only to the $100,000 fee described in his letter of July 20, 1984 and July 30, 1984 truly mystifying. If Simon holds interests adverse to those of the estate, then he would not have been appointed under section 327(a), or alternatively, would not have qualified for retroactive appointment in any case and would not therefore be entitled to any fee whatsoever.

9. 11 U.S.C. § 101(13)(A) (1982) defines "disinterested person" as a person who "is not a creditor." A "creditor" is a person who "has a claim against the debtor that arose at the time of or before

congressional wisdom in requiring prior approval of professional persons with the attendant notice to creditors. Had prior approval been sought in this case, the issue of Simon's disinterestedness would have been brought out in the open during the hearing and resolved prior to his having performed the services for which he now seeks a fee. Because we conclude, after applying the relevant factors in this case, that there were no extraordinary circumstances to support his *nunc pro tunc* appointment, we do not reach the issue of Simon's disinterestedness.

B.

The two factors enumerated in *Arkansas* of particular relevance here are who bore the responsibility for compliance with the statutory mandate that prior approval be sought from the court for employment of a professional and whether the applicant was under such time pressure to begin services that prior approval could not reasonably be sought. Simon argues that under the Bankruptcy Code and Rules AirLease bore the responsibility for seeking court approval of the appointment of professional persons, and that it was only through AirLease's oversight that the petition for approval was never filed. Although Bankruptcy Rule 2014(a) states, in relevant part, that "[a]n order approving the employment of attorneys, accountants, appraisers, auctioneers, agents, or other professional persons pursuant to § 327 or § 1103 of the Code shall be made only on application of the trustee or committee," this requirement cannot relieve the professional person

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the order for relief concerning the debtor." 11 U.S.C. § 101(9)(A). A claim includes a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured." 11 U.S.C. § 101(4).

who seeks appointment from responsibility to know that such approval is necessary and to insure that it has in fact been sought. *See In re Carolina Sales Corp.*, 45 B.R. 750, 755 (Bankr. E.D.N.C. 1985). Otherwise, the prior approval requirement of the Code could be avoided for all non-attorney professional persons merely by citing the debtor's oversight, with the attendant difficulty of determining whether it was inadvertent or not. To the extent that the bankruptcy court held that Simon, as a non-attorney, "cannot be held to be charged with the knowledge of this requirement," *AirLease*, 59 B.R. at 775, it committed legal error.

Simon is a sophisticated businessman who was represented by attorneys throughout the course of his dealings with AirLease. This is not a case in which a person, completely ignorant of the requirements of the Bankruptcy Code and without legal representation, justifiably relied on the superior expertise of another. *See In re Freehold Music Center, Inc.*, 49 B.R. 293 (Bankr. D.N.J. 1985). The evidence here suggests that Simon's attorney was familiar with the requirements of the Bankruptcy Code, including the requirements of section 327(a). In the November 28, 1984 letter written by his attorney to AirLease, Simon agreed to limit the request for court approval to the lease only, reserving questions "regarding the distribution or allocation of the proceeds from the Aloha Airlines lease." App. at 792. Even if Simon believed that AirLease had the responsibility for filing the application, we see no basis to relieve Simon from his obligation under section 327(a) to insure that the application was timely filed.

Simon argues that the second factor articulated in *Arkansas* -- whether the applicant was under time pressure to begin services -- supports the *nunc pro tunc* approval because Aloha Airlines needed the use of the plane for the 1984 Christmas season. The

bankruptcy and district courts also found that Simon "operated under severe time pressures to locate another lessee for the aircraft." *In re F/S AirLease II, Inc.*, Nos. 86-1047, 86-1048, 86-1050, slip op. at 10 (W.D. Pa. October 21, 1986). This finding reflects a misunderstanding of the "time pressure" factor, which relates solely to whether there is sufficient time to request court approval before the professional's services must begin.

Simon began negotiating with AirLease in July 1984 regarding his services and compensation therefor. AirLease declared bankruptcy on August 3, 1984. Simon first contacted Aloha in September 1984, and the approval of the lease was sought from the bankruptcy court in the end of November 1984. Simon did not seek the requisite prior approval from the court when AirLease's bankruptcy began, nor did he seek approval at any time during the four-month period in which he was performing his services. Not until June 3, 1985 -- almost a year from when he had commenced his services and a full seven months from the date he had concluded them -- did Simon petition the court for payment of administrative expenses. The estate's need to have the plane expeditiously remarketed can hardly excuse Simon's extreme laxity in seeking approval.

The time pressures on which Simon and the courts below rely are simply not the sort of exigencies contemplated by *Arkansas*. In *Arkansas* we were referring to an emergency situation in which services had to be initiated within a very short period before approval could be sought. We cited, as an example, *In re Bible Deliverance Evangelistic Church*, 39 B.R. 768 (Bankr. E.D. Pa. 1984), in which counsel was retained by a creditors committee only two weeks before a crucial meeting and was required to begin immediate preparation. Under these circumstances, the bankruptcy court found that counsel had acted with

"reasonable promptness" in seeking court appointment within two weeks of being retained. 39 B.R. at 772. The facts of this case do not approximate the exigent time pressures presented in *Bible*, and, indeed, do not indicate that Simon was faced with any time pressure at all with respect to seeking the court's approval of his prospective services.

Simon contends that his appointment should be approved because of his successful efforts in securing the Aloha lease. The bankruptcy court stated, in a finding amply supported by the record, that, "[w]ere it not for the efforts of S-J [Simon] in obtaining this lease, there would be no estate with which a reorganization could be effected." 59 B.R. at 777.

In most cases in which *nunc pro tunc* approval has been sought, the applicant has performed services of value. To this extent, there will be some unjust enrichment if compensation is not authorized. Because that is the unavoidable consequence of the statutory requirement of prior approval, we agree with the statement by the court in *In re Mason*, 66 B.R. 297, 307 (Bankr. D.N.J. 1986), that the "fact that the applicant's services were beneficial to the debtor's estate is immaterial to this court's decision regarding *nunc pro tunc* approval."

Simon treats the "prejudice" factor referred to in *Arkansas* as relating to prejudice *vel non* to any party from Simon's failure to seek prior approval. Simon and Greycas thus dispute whether Greycas, if permitted to do so by the bankruptcy court, could have performed equivalent services to Simon's at less cost. This issue is irrelevant because the statutory requirement of prior approval is not limited to those cases in which there would otherwise be prejudice. The "prejudice" factor to which we referred in *Arkansas* was only whether, in "extraordinary circumstances" cases, there would be prejudice if compensation were paid after *nunc pro*

tunc employment were approved. *Arkansas*, 798 F.2d at 650. We do not reach that factor in this case because a review of the relevant factors shows that there is no evidence in this record of the "extraordinary circumstances" that would warrant *nunc pro tunc* approval of Simon's employment.

IV.

Simon's Additional Contentions

In addition to his contentions under section 327(a), Simon argues that *nunc pro tunc* approval is unnecessary because he is entitled to a fee for his brokerage services under either section 327(b) or 503(b)(1)(A) of Chapter 11 of the Bankruptcy Code. 11 U.S.C. §§ 327(b), 503(b)(1)(A) (Supp. IV 1986).[10] We find both provisions inapplicable. Simon does not fall within section 327(b)[11] because he was not a "regularly employed . . . professional person[] on salary."

We likewise reject Simon's argument under section 503(b)(1)(A) of the Code, which permits priority payment as an administrative expense of "the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case." 11 U.S.C. § 503(b)(1)(A). Section 503(b)(1)(A) encompasses costs such as outlays for repairs, upkeep,

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10. Neither the bankruptcy court nor the district court reached these issues, as they decided the case in Simon's favor pursuant to section 327(a).

11. 11 U.S.C. § 327(b) (Supp. IV 1986) provides, in full, that:

> If the trustee is authorized to operate the business of the debtor under section 721, 1202, or 1108 of this title, and if the debtor has regularly employed attorneys, accountants, or other professional persons on salary, the trustee may retain or replace such professional persons if necessary in the operation of such business.

rent, taxes and "other costs incidental to protection and conservation" of the estate. 3 L. King, *supra*, para. 503.04, at 503-20.

The authority to pay administrative expenses for professionals, and a real estate broker, like an attorney, is a professional, is found not in section 503(b)(1)(A) but in section 503(b)(2) which permits payment as an administrative expense for "compensation and reimbursement awarded under section 330(a)." Section 330(a), in turn, empowers the court to award "reasonable compensation" to, *inter alia*, a "professional person employed under section 327." Because Simon is a professional person who was hired to "assist the [debtor-in-possession] in carrying out the [debtor-in-possession's] duties," *see* 11 U.S.C. § 327(a), and he failed to comply with that section's requirement to obtain prior approval of his appointment, he cannot rely on section 503(b)(1)(A) as a way of circumventing section 327(a). *See In re Mansfield Tire & Rubber Co.*, 65 B.R. 446, 465-66 (Bankr. N.D. Ohio 1986). If Simon were able to be compensated under section 503(b)(1)(A), it would render section 327(a) nugatory and would contravene Congress' intent in providing for prior approval.[12]

V.

Conclusion

We are mindful that the result may seem harsh in this case. In *Arkansas*, we explained our formulation of the "extraordinary circumstances" standard by reference to the legislative history and the important policies at stake. We noted that without such a

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12. Several of the parties had filed a series of motions to strike and for sanctions. We find each of these motions to be devoid of merit, especially in light of our disposition of this case, and will therefore deny them.

standard, "the bankruptcy court may be overly inclined to grant such approval influenced by claims of hardship due to work already performed." 798 F.2d at 649. We stated that, "[i]f retroactive approval were freely granted, it would subvert the prophylactic purpose underlying the statutory requirement of prior approval." *Id.* Our holding in this case reiterates and reinforces that bright-line position.

The bankruptcy court did not have the benefit of *Arkansas* when it gave its *nunc pro tunc* approval, and hence did not apply the appropriate legal standard. The district court also erred as a matter of law because it misapplied the *Arkansas* factors. For the reasons set forth above, we will reverse the order of the district court affirming the bankruptcy court's order granting *nunc pro tunc* approval of Simon's employment and remand to the district court for the entry of an appropriate order consistent with this opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

(A.O. U.S. Courts. G.M.C. Printing. Phila., Pa. 215-568-4264)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 86-3712-86-3720, 86-3731/33

F/S AIRLEASE, INC.)
)
v.)
)
GREYCAS, INC.,)
)
Appellant.)

SUR PETITION FOR REHEARING

Present: GIBBONS, Chief Judge, SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, and COWEN, Circuit Judges, and FISHER, District Judge *

The petition for rehearing filed by Appellees/Cross-Appellants, Lewis Simon and S-J Financial Corporation, in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no

judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

_____

Circuit Judge

Dated: April 19, 1988

* Hon. Clarkson S. Fisher, Chief Judge, United States District Court for the District of New Jersey, sitting by designation, as to panel rehearing only.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE: F/S AIRLEASE II, INC.	)	Bankruptcy No. 84-1628
v.	)	
LEWIS SIMON and S-J FINANCIAL CORPORATION,	)	
F/S AIRLEASE II, INC.	)	Civil Action 86-1048
v.	)	
GREYCAS, INC.	)	
F/S AIRLEASE II, INC.	)	Civil Action 86-1050
v.	)	
SWIG INVESTMENT COMPANY.	)	

MEMORANDUM OPINION

ZIEGLER, District Judge

Debtor and two creditors appeal the bankruptcy court's approval and award of $450,000.00 to Lewis Simon and S-J

Financial Corporation, appellees, for professional services rendered in obtaining a lease for debtor's Boeing 737-222 aircraft. Appellants argue that the bankruptcy court's nunc pro tunc approval is contrary to applicable law in this jurisdiction and that the court's award is unreasonable and not supported by evidence of record. We hold that appellees are entitled to nunc pro tunc approval, but we shall remand the case for a documented determination of appellees' claims.

I. History of Case

Appellees do not dispute the bankruptcy court's findings of the fact. Our independent review of the record indicates that the findings are not clearly erroneous and are substantially supported by the weight of credible evidence. For the purposes of this

appeal, we adopt the following findings of the bankruptcy court, as reported in Matter of F/S Airlease II, Inc., 59 B.R. 769, 771-72 (Bankr. W.D. Pa. 1986):

"The Debtor is a single-asset corporation, which has the sole purpose of leasing and remarketing a certain Boeing 737-222 aircraft. This aircraft was purchased by the Debtor in July of 1980, and financing for the purchase was obtained from Greycas, Inc. (debtor's largest single creditor). The aircraft was subsequently sold and repurchased several times, the final purchaser being the Swig Investment Company Aircraft Trust No. 1 ("Swig"). Swig subsequently leased the aircraft to the Debtor for an 18-year term. At all times, Greycas continued to hold a security interest and was to be repaid from the rental proceeds

received as a result of the Debtor's releasing of the aircraft.

"In February of 1980, the Debtor entered into an initial agreement with S-J, hiring it as a leasing agent to find leases for various aircrafts. In July of 1980, S-J successfully arranged for the lease of the Boeing 737-222 aircraft to Air Florida. Soon thereafter, a disagreement arose between the Debtor and S-J as to the appropriate compensation due S-J for its services. Litigation was instituted in the United States District Court for the Northern District of Illinois, which ultimately was resolved by a Settlement Agreement dated May 27, 1983. This Agreement directed that S-J would be entitled to compensation in the amount of one-half of one month's rent for each year of releasing, and would give S-J the remarketing rights to this

and other aircraft, subject to the rights of the various owners and secured lenders. Additionally, the Settlement Agreement stated the S-J had a right to payment only when the Debtor received payment.

"On July 3, 1984, Air Florida, the lessee of this aircraft, filed a Chapter 11 bankruptcy, which effectively terminated the aircraft lease, leaving the aircraft available for release or sale. The Debtor immediately contacted S-J, urging it to assist in the search for a new lessee. On July 20, 1984, S-J sent a letter to the Debtor proposing to remarket the aircraft for a flat fee of $100,000.00 plus expenses, irrespective of the new lease terms. On July 30, 1984, S-J forwarded a second letter to the Debtor, again offering to act as the leasing representative for the

$100,000.00 flat fee, plus expenses. S-J specified that it needed a response by August 3, 1984. On August 21, 1984, almost three (3) weeks after the expiration date, the Debtor wrote to S-J, accepting the proposed arrangement. This acceptance was conditioned upon the approval of Swig. Swig, for unspecified reasons, categorically refused to approve any flat fee arrangement, and accordingly that offer was terminated. Only now, after S-J has procured a 10-year lease and requested $450,000.00, has Swig inferred that the Court should imposed the $100,000.00 fee upon S-J.

"On July 25, 1984, S-J and representatives for the Debtor traveled to Phoenix, Arizona, Greycas' headquarters, to discuss possible leasing of this aircraft to America West Airlines ("America West"). This joint trip was

the result of several meetings among the Debtor, S-J, and Greycas, during which time the possibilities of various leases and lessees were discussed. Greycas' proposal to lease the aircraft to America West was contingent upon Greycas obtaining possession of the aircraft, which possession it did not have, and could not have, pursuant to final court order.

"With a general understanding as to professional fees but no finalized written agreement between them, the Debtor requested that S-J proceed with attempts to remarket the aircraft. At that time the aircraft was not airworthy, in that one of its engines had been removed and was placed, disassembled, in a box. Since the aircraft was not airworthy, it was providing no revenue to any of the parties. In September of

1984, Greycas made a proposal to America West which called for a 6-month lease with a 10-year option. The monthly rental fee proposed was $85,000.00. Additionally, since the aircraft was missing an engine, Greycas proposed to have America West lease an engine and subtract the cost of the leased engine from the monthly rental payments. Again, this proposal was contingent upon Greycas' receipt of the aircraft which it did not and could not obtain.

"By October 25, 1984, S-J had procured a Letter of Agreement with Aloha Airlines ("Aloha"). The Agreement called for a 10-year lease at a monthly rental of $90,000.00. Further, Aloha, a more solvent and stable airline, agreed to supply the necessary second engine, without receiving a rent rebate thereon, and also agreed to return the aircraft at

the conclusion of the 10-year lease with two operational engines instead of one.

"On November 29, 1984, the Debtor and Aloha prepared a lease based on the agreement procured by S-J. The following day, and Order was entered in [bankruptcy] Court approving this lease, finding it to be in the best interests of the estate. At that hearing the parties made the Court aware that the Debtor had requested S-J to procure a lease, that S-J had procured same, and that Greycas, while nominally objecting to S-J's involvement, wanted the lease, secured by S-J, to be approved."

The bankruptcy court cited the general rule that court authorization before services are rendered is a condition precedent to any fee application, citing Bankruptcy Rule 2014(a) and In re Hydrocarbon Chemicals,

Inc., 411 F.2d 203 (3d Cir. 1969). However, the court noted, a bankruptcy court exercises powers of a court in equity and equitable principles favor nunc pro tunc approval of fee applications in certain extraordinary cases. In a well-crafted opinion, Judge Markovitz found that S-J qualified as a professional person under 11 U.S.C. §327, that S-J exercised a high degree of skill and expertise in arranging the lease with Aloha, that failure to apply for court approval before S-J rendered its services to debtor was not the fault of S-J, and that S-J had no interest adverse to debtor to bar equitable nunc pro tunc approval. The court then considered the commercial reasonableness of the requested $450,000.00 fee based upon expert testimony of the value of the Aloha lease to debtor and standard fees

in the aircraft leasing industry. The court awarded the requested compensation of $450,000.00.

II. Discussion

Two basic issues have been presented on appeal. First, appellants argue, S-J and Lewis Simon are not entitled to nunc pro tunc approval because they cannot satisfy the statutory requirements of 11 U.S.C. §327(a) and have not presented the required extraordinary circumstances to justify such approval. The second issue is whether the award to appellees was documented sufficiently and was reasonable.

A. Nunc Pro Tunc Approval

The Court of Appeals recently held that bankruptcy courts have the power to authorize retroactive employment of counsel and other professionals under their broad equity power. In the Matter

of: Arkansas Company, Inc., 798 F.2d 645, 648 (3d Cir. 1986). As the court stated, at 648: "Where equitable concerns weigh in favor of granting retroactive approval to enable deserving professionals to recover compensation for work actually done, we see nothing in the statute that denies the bankruptcy court the power to grant such retroactive approval."

However, the court limited retroactive approval to certain extraordinary cases because "a lenient [retroactive approval] rule would subvert Congress' purposes in imposing a prior approval requirement." Id. at 648. The term, "extraordinary circumstances," was defined as "cases where prior approval would have been appropriate and the delay in seeking approval was due to hardship beyond the professional's control." Id. at 650.

The court then summarized the test to be applied in determining whether nunc pro tunc approval is warranted. The bankruptcy court first must determine whether the applicant qualifies as a professional person under the statutory provisions of 11 U.S.C. §§327(a) and 1103(a). Such a determination, to be made after a hearing, entails a finding that the applicant is disinterested and without an adverse interest and that the services performed were necessary under the circumstances. Id. at 650. Our review of this determination is plenary. Second, the bankruptcy court, "in exercising its discretion," must determine whether the particular circumstances of the case excuse the failure of prior approval. Id. at 650. Our review of this determination is

limited to an abuse of discretion standard.

Section 327(a) permits the trustee to employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's statutory duties. Appellant debtor argues that Lewis Simon and S-J were not employed as "professional persons" within the meaning of section 327(a) because appellees were creditors of debtor when the bankruptcy petition was filed.

The bankruptcy court found that appellees were not creditors of debtor. Reviewing the May 27, 1983, settlement agreement between debtor and S-J, the court determined that the agreement

expired by its own terms before the bankruptcy petition was filed, and that debtor had no cause to list S-J as a creditor based on an agreement no longer binding on the parties. Our review of the agrement and evidence of record indicates that the court's finding is not erroneous. The agreement was based on the leasing of the Boeing aircraft to Air Florida, Inc. See paragraph 1 of the agreement, Appendix B to Memorandum of Swig Investment Company. As the bankruptcy court found, the July 3, 1984, bankruptcy filing by Air Florida effectively terminated the aircraft lease, and S-J and Lewis Simon were no longer creditors under the May 1983 agreement. S-J continued to seek a lessee for the aircraft at debtor's request. At the time of debtor's filing

on August 3, 1984, no lease had been obtained.

The issue of law facing the bankruptcy court was whether S-J acted as a retained professional under section 327(a) after August 3, 1984. We agree with the lower court that appellees qualify as "professional persons" within the meaning of section 327(a). S-J and Lewis Simon were experienced in arranging leases for aircraft; they set up a lucrative, long-term lease with Aloha Airlines, a reputable airline; and they were able to obtain the lease despite the fact that the Boeing aircraft was not airworthy at the time. We further agree that appellees were retained by debtor following its August 3, 1984, bankruptcy petition filing. As the bankruptcy court correctly found, debtor retained appellees to locate a lessee for the

aircraft under two agreements, dated August 13 and 21, 1984. Tr. at 11; Exhibits F and G to Affidavit of Fred Pink, vice president of Greycas, Inc. We also agree that retention of appellees was "reasonably necessary in the administration of the estate" and "necessary for the protection and benefit of the estate." 2 Collier on Bankruptcy, ¶327.01 (1986). Appellant Greycas, which held a security interest in the aircraft, attempted to arrange a lease for the aircraft after Air Florida filed for bankruptcy. However, Greycas's deal with America West Airlines was thwarted because Greycas could not legally obtain possession of the aircraft. The only lease effort to bear fruit was by S-J which, in November 1984, arranged a 10-year lease with Aloha at a monthly rental rate of $90,000.00. As the bankruptcy

court noted: "Further, it must be realized that the total amount brought into the estate by this lease, which is $10,800,000.00 over the course of the 10-year lease, is the sole asset of the Debtor's estate. Were it not for the efforts of S-J in obtaining this lease, there would be no estate with which a reorganization could be effected." In the Matter of F/S Airlease II, Inc., supra, at 77.

The second part of the Arkansas Company test for nunc pro tunc approval is whether the particular circumstances in the case adequately excuse the failure of prior approval. As rehearsed, our review is limited to the question of whether the bankruptcy court abused its discretion in excusing the failure. According to the Court of Appeals, the bankruptcy court must consider the

following factors: "whether the applicant or some other person bore responsibility for applying for approval; whether the applicant was under time pressure to begin service without approval; the amount of delay after the applicant learned that initial approval had not been granted; the extent to which compensation to the applicant will prejudice innocent third parties; and other relevant factors." Arkansas Company, supra, at 650. In Arkansas Company, the court held that nunc pro tunc approval was not warranted because the petitioner was a law firm with experienced bankruptcy practitioners who were aware of the need to apply for prior approval of fees. The Arkansas Company court, however, noted that failure to seek court approval may be excused where the professional justifiably relied on

another party to obtain court approval (citing In re Freehold Music Center, 49 B.R. 293 (Bankr. D.N.J. 1985)).

In the instant case, Judge Markovitz aptly characterized testimony as showing that S-J had requested assurance that its services would be permitted by the bankruptcy court and that it was reassured by debtor's officers that appropriate measures would be taken. Further, the court noted, "the Debtor's president testified that no application was made to this Court through an oversight on the part of the Debtor." In the Matter of F/S Airlease II, Inc., supra, at 775 (emphasis in original). This finding, coupled with other lower court findings that S-J and debtor operated under severe time pressures to locate another lessee for the aircraft and that S-J's successful efforts

resulted in profit not prejudice for third parties, indicates that the bankruptcy court did not abuse its discretion in excusing the prior failure to seek approval for S-J's services.

B. Amount of Award

Finding that the fee requested by S-J was fair and reasonable in light of the value conferred on debtor, the bankruptcy court awarded $450,000.00 to S-J. Appellants argue that S-J's petition for fees is woefully inadequate under bankruptcy procedural rules and does not adequately support the requested award. Appellees rejoin that debtor had admitted that $450,000.00 was owed to S-J as an administrative claim and expense, according to a letter debtor sent to Greycas and other parties.

Under the Bankruptcy Code, the court may award compensation to a professional employed under section 327 "for actual, necessary services rendered by such . . . professional person . . . based on the time, the nature, the extent, and the value of such services and the cost of comparable services . . . ." 11 U.S.C. §330(a)(1). According to Bankruptcy Rule 2016(a), such compensation may be awarded only after the professional files an application with the court "setting forth a detailed statement of (1) the services rendered, time expended and expenses incurred, and (2) the amounts requested."

The Code requires a detailed statement so that the court can determine an award both compensating petitioner for its services and protecting debtors and creditors. The fact that debtor represented that $450,000.00 was

appropriate compensation does not abrogate the court's duty to protect creditors such as Greycas and Swig. Also, expert testimony that $450,000.00 is a reasonable award in light of the benefit conferred by S-J on debtor does not satisfy the requirements of Rule 2016(a).

We shall vacate the award and remand the case to the bankruptcy court, with directions to require S-J to file an application satisfying Rule 2016(a) and to hold a hearing on the application. In so ruling, we urge the parties to bridle their propensity for burdening the court with unnecessary and irrelevant papers and motions. The only matters to be determined upon remand are the documentation of S-J's time and expenses

in obtaining the Aloha lease and the reasonable value therefor.[1]/

The final argument raised by Greycas in this appeal, i.e., that S-J cannot properly charge Greycas's collateral for payment of its compensation, was resolved properly by the bankruptcy court.

III. Summary

Because S-J and Lewis Simon qualify as professional persons under 11 U.S.C. §327(a) retained by debtor to perform necessary services following its bankruptcy petition filing and because the bankruptcy court did not abuse its

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1/ We recognize that some expenses of negotiating the aircraft lease with Aloha Airlines were incurred by S-J and Lewis Simon before debtor's bankruptcy petition was filed. Although the argument has not been raised by appellants, we foresee an issue as to whether appellees are entitled to compensation for work performed before they were retained under 11 U.S.C. §327. This issue is properly reserved for determination by the bankruptcy court upon remand.

discretion in excusing the failure to seek court approval before appellees rendered services, nunc pro tunc approval of compensation is warranted under the law of this circuit. In re: Matter of: Arkansas Company, Inc., supra. Because appellees' application for fees lacks the required specificity under the Bankruptcy Code, the award will be vacated the case remanded for an amended application and a hearing on the reasonableness of the newly documented fees.

A written order will follow.

DATED: Oct. 21, 1986

Donald E. Ziegler
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE: F/S AIRLEASE II, INC.	)	Bankruptcy No. 84-1628
v.	)	
LEWIS SIMON and S-J FINANCIAL CORPORATION,	)	
F/S AIRLEASE II, INC.	)	
v.	)	Civil Action 86-1048
GREYCAS, INC.	)	
F/S AIRLEASE II, INC.	)	
v.	)	Civil Action 86-1050
SWIG INVESTMENT COMPANY.	)	

ORDER OF COURT

AND NOW, this 21st day of October 1986,

IT IS ORDERED that the bankruptcy court's nunc pro tunc approval allowing compensation to appellees-petitioners be and hereby is affirmed;

IT IS FURTHER ORDERED that the bankruptcy court's award of $450,000.00 be and hereby is vacated and the case remanded to the bankruptcy court for an amendment of the fee petition to conform to Bankruptcy Rule 2016(a) and for a hearing thereon.

Donald E. Ziegler
United States District Judge

cc: Counsel of Record

APPENDIX C

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN THE MATTER OF:

F/S AIRLEASE
II, INC., Bankruptcy No. 84-1628

Debtor Motion No. 85-2157

MEMORANDUM OPINION

Before this Court is an application For Professional Fees By Petitioner, Mr. Lewis Simon and S-J Corporation ("S-J"), averring that it procured a lease at the Debtor's request, that said lease constitutes the sole asset of the estate, and that it should be compensated in the amount of $450,000.00, based upon the fees received in past conduct with the Debtor and upon the fees charged for such services in the marketplace.

F/S Airlease II, Inc. ("Debtor") has objected to the payment of the compensation requested, claiming, that

while S-J should be compensated to some degree for the services performed, the amounts requested are excessive and would deter the formulation of a proposed Plan of reorganization.

Greycas, Inc. ("Greycas"), the largest secured creditor, has objected to the payment of any compensation to S-J, asserting inter alia that S-J has no legal basis for its claim as prior Court approval was not secured.

Swig, the owner of the aircraft, now requests that the Court impose a $100,000.00 limit to S-J's compensation- an amount which Swig refused to accept during the initial negotiations.

The parties conducted an extensive hearing on the various issues and offered complete testimony, both at the hearing and through depositions. The parties have also submitted very complete and

thoroughly researched briefs, proposed Findings of Fact and Conclusions of Law. Based upon the various pleadings, memoranda, and the hearing thereon, this Court concludes that S-J is entitled to compensation in the amount of $450,000.00

FACTS

The Debtor is a single-asset corporation, which has the sole purpose of leasing and remarketing a certain Boeing 737-222 aircraft. This aircraft was purchased by the Debtor in July of 1980, and financing for the purchase was obtained from Greycas. The aircraft was subsequently sold and repurchased several times, the final purchaser being the Swig Investment Company Aircraft Trust No. 1 ("Swig"). Swig subsequently leased the aircraft to the Debtor for an 18-year

term. At all times, Greycas continued to hold a security interest and was to be repaid from the rental proceeds received as a result of the Debtor's releasing of the aircraft.

In February of 1980, the Debtor entered into an initial agreement with S-J, hiring it as a leasing agent to find leases for various aircrafts. In July of 1980, S-J successfully arranged for the lease of the Boeing 737-222 aircraft to Air Florida. Soon thereafter, a disagreement arose between the debtor and S-J as to the appropriate compensation due S-J for its services. Litigation was instituted in the United States District Court for the Northern District of Illinois, which ultimately was resolved by a Settlement Agreement dated May 27, 1983. This Agreement directed that S-J would be entitled to compensation in the

amount of one-half of one month's rent for each year of releasing, and would give S-J the remarketing rights to this and other aircraft, subject to the rights of the various owners and secured lenders. Additionally, the Settlement Agreement stated that S-J had a right to payment only when the Debtor received payment.

On July 3, 1984, Air Florida, the lessee of this aircraft, filed a Chapter 11 bankruptcy, which effectively terminated the aircraft lease, leaving the aircraft available for release or sale. The Debtor immediately contacted S-J, urging it to assist in the search for a new lessee. On July 20, 1984, S-J sent a letter to the Debtor proposing to remarket the aircraft for a flat fee of $100,000.00 plus expenses, irrespective of the new lease terms. On July 30,

1984, S-J forwarded a second letter to the Debtor, again offering to act as the leasing representative for the $100,000.00 flat fee, plus expenses. S-J specified that it needed a response by August 3, 1984. On August 21, 1984, almost three (3) weeks after the expiration date, the Debtor wrote to S-J, accepting the proposed arrangement. This acceptance was conditioned upon the approval of Swig. Swig, for unspecified reasons, categorically refused to approve any flat fee arrangement, and accordingly that offer was terminated. Only now, after S-J has procured a 10-year lease and requested $450,000.00, has Swig inferred that the Court should impose the $100,000.00 fee upon S-J.

Only July 25, 1984, S-J and representatives for the Debtor traveled to Phoenix, Arizona, Greycas'

headquarters, to discuss possible leasing of this aircraft to America West Airlines ("America West"). This joint trip was the result of several meetings among the Debtor, S-J, and Greycas, during which time the possibilities of various leases and lessees were discussed. Greycas' proposal to lease the aircraft to America West was contingent upon Greycas obtaining possession of the aircraft, which possession it did not have, and could not have, pursuant to final court order.

With a general understanding as to professional fees but not finalized written agreement between them, the debtor requested that S-J proceed with attempts to remarket the aircraft. At that time the aircraft was not airworthy, in that one of its engines had been removed and was placed, disassembled, in

a box. Since the aircraft was not airworthy, it was providing no revenue to any of the parties. In September of 1984, Greycas made a proposal to America West which called for a 6-month lease with a 10-year option. The monthly rental fee proposed was $85,000.00. Additionally, since the aircraft was missing an engine, Greycas proposed to have America West lease an engine and subtract the cost of the leased engine from the monthly rental payments. Again, this proposal was contingent upon Greycas' receipt of the aircraft which it did not and could not obtain.

By October 25, 1984, S-J had procured a Letter of Agreement with Aloha Airlines ("Aloha"). The Agreement called for a 10-year lease at a monthly rental of $90,000.00. Further, Aloha, a more solvent and stable airline, agreed to

supply the necessary second engine, without receiving a rent rebate thereon, and also agreed to return the aircraft at the conclusion of the 10-year lease with two operational engines instead of one.

On November 29, 1984, the Debtor and Aloha prepared a lease based on the agreement procured by S-J. The following day, an Order was entered in this Court approving this lease, finding it to be in the best interests of the estate. At that hearing the parties made the Court aware that the Debtor had requested S-J to procure a lease, that S-J had procured same, and that Greycas, while nominally objecting to S-J's involvement, wanted the lease, secured by S-J, to be approved. The rental proceeds were to be, and have been, deposited in an interest-bearing account pending disposition of this matter.

LEGAL ARGUMENTS

Greycas, the Debtor, and S-J each make several arguments either for or against the allowance of compensation to S-J. Each party's arguments will be outlined seriatim.

Greycas' Arguments

Greycas offers several arguments for disallowing any compensation whatsoever to S-J.

Pursuant to the May, 1983 Settlement Agreement Greycas avers that:

1. The contract was not executory at the time of the Debtor's filing and it could not be assumed.

2. Even if the contract was executory, the time for assumption of such a contract had passed.

3. The contract cannot be revived by the court.

4. The exclusive right to remarket the aircraft had expired.

5. Compensation under the contract rate cannot be allowed because S-J did not comply with the provisions requiring consent of Swig and Greycas.

Greycas claims that the Debtor and S-J attempted to obtain Greycas' consent on two separate occasions and failed.

Next, Greycas argues that no court approval of S-J's retention was either sought or obtained, as required by 11 U.S.C. §327(a), and that absent such court approval, S-J is not entitled to any compensation.

Additionally, Greycas argues that the court should not approve S-J's retention nunc pro tunc because: S-J has not provided detailed records for the court to determine the amount of work done; it is not disinterested, as it

holds an interest adverse to the estate, thereby precluding its appointment; and, nunc pro tunc orders appointing professional persons should not be permitted.

Greycas also argues that S-J cannot recover as a regular, salaried employee pursuant to 11 U.S.C. §327(b) because:

1. S-J was an independent contractor, paid on commission as opposed to a salary.

2. The 10-year lease agreement with Aloha does not constitute work done in the ordinary course of business, as anticipated by the Code.

3. The lease required court approval, which would not be necessary if section 327(b) applied.

Finally, Greycas argues that since it is secured in the funds which S-J wishes to obtain, S-J must meet certain requirements to attach those funds, and S-J has not done so.

Specifically, S-J has not shown:

1. Its costs and expenses were reasonable and necessary.

2. Its costs and expenses were encountered in the preservation of the estate.

3. It provided a benefit to the estate which Greycas could not have provided without additional costs to the estate.

Debtor's Arguments

The Debtor raises many of the same arguments that Greycas raises. The Debtor first states that S-J did not have prior court approval for its employment, thereby barring any compensation. Additionally, the Debtor argues that S-J cannot be approved nunc pro tunc as no extraordinary circumstances exist requiring the Court to equitably permit such approval and, as S-J is not

disinterested, it could not have been approved even if the application had been timely submitted.

The Debtor also raises the argument that the May, 1983 agreement is not executory and cannot be assumed. The Debtor's final argument is novel, in that it avers that S-J has benefited the estate, and equitably, should receive some compensation. However, the Debtor argues that if S-J is granted the full amount it seeks, any hope for a Plan of reorganization will fail. The Debtor contends that all of the other parties have agreed to reductions in the amounts due them in order to put forward a reorganization Plan, and that S-J should be satisfied to do the same. It should be recognized that the various counsel have submitted fee applications, also to be paid from the rent accruals. It is

interesting to note that there would have been no estate for these attorneys to divide if S-J had not procured the lease. It would appear to be grossly inequitable to pay the litigators more than the creator.

S-J's Arguments

S-J initially asserts that no Court order is required before it can be compensated, because S-J carried out its activities in the ordinary course of the Debtor's business, operating in a marketing capacity. Alternatively, S-J argues that if approval is necessary, it should be granted nunc pro tunc, in that:

1. That the Debtor assured S-J would be compensated, but that formal Court approval was not obtained due to an admitted oversight on the part of the Debtor.

2. But for S-J's services, there would be no estate to administer and no company to reorganize.

3. Its assistance in obtaining the lease was allowed, if not formally accepted, by all parties now objecting.

4. That the Court can exercise its equitable powers to approve the employment nunc pro tunc in extraordinary circumstances, such as are present here.

Further, S-J states that it is a disinterested party, and could have been approved if the application had been presented by the Debtor in a timely fashion.

ANALYSIS

Upon a careful reading of the May, 1983 Settlement Agreement, it is clear that it had expired by its own terms prior to the filing of the Debtor's

petition. As such, it is not executory, and affords no rights to S-J under 11 U.S.C. §365. It does, however, show the prior course of performance between the parties, including methods, mode and amounts of compensation, and will be recognized in that fashion by this Court.

We next address the issue of required Court approval prior to the compensation of professional persons employed to assist the bankruptcy estate. Bankruptcy code §327(a) and Bankruptcy Rule 2014 specifically outline the law and procedures surrounding the employment of professional persons. Section 327(a) states in pertinent part:

> "[E]xcept as otherwise provided in this section, the trustee, with the Court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are

> disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title."

Pursuant to §1107 of the Code, the term 'debtor-in-possession' is interchangeable with the term 'trustee', pursuant to §327. Bankruptcy Rule 2014(a) states in pertinent part:

> "[A]n order approving appointment of attorneys, accountants, appraisers, auctioneers, agents, or other professional persons pursuant to §327 or §1103 of the Code shall be made only on application of the trustee or committee, stating the specific facts showing the necessity for the employment, the name of the person to be employed, the reason for his selection, the professional services to be rendered, any proposed arrangement for compensation, and to the best of the applicant's knowledge, all of the persons' connections with the debtors, creditors, or any other party in interest, their respective attorneys and accountants."

Many courts have held that court authorization prior to the services being

rendered is the one absolute basic condition precedent to any fee application. See In re Hydrocarbon Chemicals, Inc., 411 F.2d 203 (3rd Cir. 1969); In re Calpa Products Company, 411 F.2d 1373 (3rd Cir. 1969); In re Garland Corporation, 8 B.R. 826 (Bktcy. D.C. Mass. 1981); In re Fountain Bay Mining Company, Inc., 46 B.R. 122 (Bktcy W.D. Va. 1985).

This rule has been enforced not only as to attorneys but also as to non-legal professionals. See In re Mork, 19 B.R. 947 (Bktcy. D.C. Mich. 1982); In re Morton Shoe Company, 22 B.R. 449 (Bktcy. D. Mass. 1982); In re Saplin Paints, Inc., 38 B.R. 807 (Bktcy. E.D. N.Y. 1984).

This rule has often been held to be hard and fast despite the fact that the services rendered may have been highly

valuable to the estate and performed in complete good faith. See In re Garland Corporation, supra, at 828; In re Morton Shoe Company, supra, at 450; In re Sapolin Paints, Inc., supra, at 817.

Both the Debtor and Greycas argue to this court that this inflexible per se rule as to the court-approved employment is the law in the Third Circuit, and that therefore, S-J is not entitled to any compensation for services performed, as court approval was not obtained prior to the performance of the services.

S-J, on the other hand, argues that this Court, as a court of equity, should not hold fast to such an inflexible per se rule in extraordinary cases, urging this Court to approve the employment nunc pro tunc.

It is true that a bankruptcy court exercises powers of a court of equity and

equitable principles should govern the exercise of its jurisdiction. While such nunc pro tunc orders were originally frowned upon, many courts in recent years have allowed entry of nunc pro tunc orders on a case-by-case determination. Interestingly, the majority of the courts which have denied nunc pro tunc orders of employment have done so due to some other form of misconduct on the part of the applicant, which would have barred that individual's appointment even had the approval been requested in a timely fashion.

In In re Mork, supra, the court denied nunc pro tunc authorization of the services rendered by an accounting firm stating:

> "[I] conclude that as here, not only absent an order, but absent any communication with the court whether or not resulting in an order, sufficient to appraise the

> court as to the intended retention and its necessity in terms, the court is without power to undue what has been done." 19 B.R. at 949.

In the case at bar, however, it is clear that the court was aware from early in these proceedings, that S-J was involved in the releasing and remarketing of the aircraft. It is also clear that the present day objectors had previously been aware of the Applicant's activities and in addition, had voiced their great appreciation for his services. Had the Debtor honored its agreement and presented the Applicant's employment application, this Court is hard pressed to think of any reason why it would not have been granted.

In In re Morton Shoe Company, supra, the court disallowed nunc pro tunc approval for a financial expert and for accountants because the court determined

that no emergency existed warranting such approval. In Morton, unlike here, the court found that "hardship to the unauthorized professional is of no consequence since it is of his own making." 22 B.R. at 450. That court seemed to believe that hardship, if not of the professional's own making, would be an extraordinary situation which would allow nunc pro tunc approval.

Testimony before this Court has shown that S-J had in fact requested several times that it be given some assurance that its services would be permitted by the court. Testimony also indicated that S-J was assured by the Debtor's officers that the appropriate measures would be taken to assure that S-J would be acknowledged by this Court. Further, the Debtor's president testified that no application was made to this

Court through an oversight on the part of the Debtor.

It should be noted also, that the Bankruptcy Code and Rules suggest that the application for appointment of such professional persons should be made by the trustee or the debtor-in-possession and that S-J is neither. Further, S-J as a leasing agent does not hold itself out to be knowledgeable in the area of bankruptcy law. There is no indication that Mr. Simon or anyone else involved with S-J Corporation is an attorney and therefore, S-J cannot be held to be charged with the knowledge of this requirement.

Both the Debtor and Greycas direct the court's attention to In re Lewis, 30 B.R. 404 (Bktcy. E.D. Pa. 1983), in which the court did not permit the nunc pro tunc approval of the hiring of an

attorney for the debtor. In that case, the court found:

> "[T]o permit ex post facto employment would exalt form over substance to an unreasonable extent. The court also notes that both Mr. Schildhorn and the members of his firm are experienced practitioners in this field of law. We are not confronted with an attorney who through inexperience has failed to file the necessary application, but rather, with an attorney who should be fully aware of this requirement." 30 B.R. at 405-6.

Again, the court seems to indicate that if the circumstances surrounding the absent approval were different, a nunc pro tunc application might be granted.

A very recent case in the Third Circuit that appears to be factually similar to our case, is Matter of Freehold Music Center, Inc., 49 B.R. 293 (Bktcy. D. N.J. 1985). In that case, accountants hired for the debtor specifically requested protection before

commencing any work and were advised by the attorneys for the debtor that the appropriate application would be prepared and submitted to the court. The accountants were therefore aware that court approval was necessary before they could be paid, but in good faith relied on the statements of the attorney that authorization for their work had been obtained or had been properly arranged.

The court stated:

> "[T]he position of the accountants in the instant case is further made sympathetic by the fact that the error, if indeed there was one, was occasioned not by their own actions, but rather by the action of another whose failure was beyond their own control." 49 B.R. at 296.

In In re Century Food, Inc., 39 B.R. 602 (Bktcy. M.D. Pa. 1984), a real estate broker who performed services for the estate received nunc pro tunc approval after the broker's work was completed.

There, the court stated:

> "[A]though we realize that nunc pro tunc orders should be authorized sparingly, this Court certainly has the discretion to administer equitable principles by entering such orders." 39 B.R. at 604.

It is clear therefore, that the inflexible nature of the per se rule once enunciated is presently being worn away by the equitable principles of the Bankruptcy Law on a case-by-case determination.

If however, a nunc pro tunc order for approval of appointment for the employment of a professional person is to be allowed, the part whose approval is sought must show that had the application been timely, the party would still have met the other requirements for employment as a professional person pursuant to §327. Both the Debtor and Greycas argue

that S-J does not meet the other requirements of §327.

Specifically, they claim that in order for S-J to be qualified under §327(a), it must meet two (2) requirements:

1. It must not hold or represent an interest adverse to the estate.

2. It must be a disinterested person within the meaning of the Code.

To hold an interest adverse to the estate means: "(1) to possess or assert any economic interest that would tend to lessen the value of the bankruptcy estate or that would create either an actual or potential dispute in which the estate is a rival claimant; or, (2) to possess a predisposition under circumstances that render such a bias against the estate." In re Roberts, 46 B.R. 815, 827 (Bktcy. D. Utah 1985).

To hold that fees for services rendered to the debtor constitute an interest adverse to the estate is a position without logic. If such a statement were held to be true, then the attorneys representing the debtors who are presenting petitions for fees would also be held to have interests adverse to the estate, and therefore, would also be disqualified from compensation under §327.

Further, it has previously been held that an attorney who is a major creditor of the debtor due to his prior representation of the debtor and due to his preparation of the petition in bankruptcy, does not, without more, have an interest adverse to the debtor. See In re Heatron, 5 B.R. 703 (Bktcy. W.D. Mo. 1980).

The Debtor and Greycas also claim that S-J is not a disinterested person pursuant to the Bankruptcy Code. They base this claim on the fact that S-J has been listed by the Debtor has having a contingent disputed claim to funds resulting from their exclusive remarketing right under the Settlement Agreement of May, 1983.

This Court has earlier found that the May, 1983 Settlement Agreement expired by its own terms and is therefore no longer binding on any of the parties. Therefore, it was no longer binding on the parties at the time this bankruptcy petition was filed. Since S-J's exclusive remarketing right had expired prior to the filing of the bankruptcy, this Court can find no other cause for listing S-J as a creditor of the Debtor corporation.

As the court finds no reason to hold that S-J has an adverse interest to the Debtor, nor can the court find any reason to find that S-J lacks the required disinterestedness, the Court believes that there are no obstacles barring its equitable approval of the employment of S-J nunc pro tunc.

There still remains to be considered however, the reasonableness of the $450,000.00 fee requested by S-J Corporation for its services to the Debtor's estate. There are many standards which exist for determining reasonableness of fees requested.

Some of these factors include:

1. The commercial reasonableness of the fee in light of what the market would pay for such a transaction outside the Bankruptcy Court.

2. The funds available in the Debtor's estate to pay such a fee.

3. The amount brought into the estate by the Applicant.
4. The difficulty of the services rendered by the Applicant

At the hearing of January 21, 1986, testimony was taken from Mr. Thomas Hiniker, who is employed in much the same capacity as Mr. Simon and S-J Corporation, in that he has leased aircraft similar to the one in question. Mr. Hiniker testified that a reasonable fee in the aircraft leasing industry, when based upon a percentage of the rentals received, would be from five to ten percent of the total rentals received, and that fees might be higher when a transaction is exceptionally difficult. The fee charged and requested by S-J is less than five percent of the total rentals received over the 10-year lease period, which is below the bottom of the scale delineated by Mr. Hiniker.

The lease was approved and ordered on November 30, 1984. Sixteen (16) months have elapsed since that lease was ordered. The

rental fee of $90,000.00 per month was ordered to be placed in an interest-bearing account. The total rental payments which should be in said interest-bearing account as of March 31, 1986, is $1,440,000.00, irrespective of interest accrued thereon. It is clear therefore, that the funds do exist for the payment of $450,000.00 to be made to S-J. Further, it must be realized that the total amount brought into the estate by this lease, which is $10,800,000.00 over the course of the 10-year lease, is the sole asset of the Debtor's estate. Were it not for the efforts of S-J in obtaining this lease, there would be no estate with which a reorganization could be effected. Additionally, it should be recognized that the aircraft in question was not in airworthy condition at the time the lease was procured. The leasing of an aircraft with only one of two engines must be considered a difficult deal to arrange. Given the fact

that S-J was able to convince Aloha, a highly reputable airline, to lease said aircraft and also to supply the additional, necessary engine without any rental rebate, shows this Court that S-J possesses a high level of skill and expertise in this field. It is further clear that it would be highly difficult to lease such an unairworthy aircraft to most other airlines, given the fact that America West was to be given a credit on each monthly rental payment in order to supply an engine for use on the plane, and that no engine would be returning with the aircraft at the end of the 10-year lease. If this were not enough, S-J was able to get aloha to commit to a full 10-year lease term with knowledge that the plane was not airworthy. America West, on the other hand, was offered only a 6-month lease with a 10-year option. This gives the court reason to believe that America West was unwilling to make such a long-term commitment until it had the

opportunity to use the aircraft, and determin if the aircraft would meet its needs.

Therefore, this Court is of the opinio that the fee requested by S-J of $450,000.00 i reasonable and should be granted.

The final argument presented by Greycas i that the expenses requested by S-J should no be paid from funds belonging to it as a secure creditor. Specifically, Greycas contends tha it received no benefit from the efforts by S- and therefore, its security should not b impinged by the fees and expenses.

The Code discusses the appropriateness o such a charge in §506(c) which states:

> "[T]he trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim."

The Advisory Notes accompanying §506(c) state in pertinent part:

> "Any time the trustee or debtor-in-possession expends money to provide for the reasonable and necessary costs and expenses of preserving. . . . a secured creditor's collateral, the trustee or debtor-in-possession is entitled to recover such expenses from the secured party or from the property securing an allowed secured claim held by such a party." (Emphasis added.) 124 Cong. Rec. H11089 (Sept. 28, 1978), reprinted in 1978 U.S. Code Cong. & Ad. News 6346, 6451 (statement by Rep. Edwards); 124 Cong. Rec. §17406, reprinted in 1978 U.S. Code Cong. & Ad. News 6505, 6520 (statement by Sen. DeConcini).

Traditionally, expenses for the administration of the bankruptcy have not been charged against a secured creditor. The reason for this is that a trustee is acting not only on the secured creditor's interest, but for the interest of the general creditors as well.

An exception to that general rule is recognized when the expenses incurred in preserving the estate are primarily used

to benefit the secured creditor or where that secured creditor caused or consented to the expense incurred. See Matter of Trim-X, Inc., 695 F.2d 296, 301 (7th Cir. 1983). Further, the courts have held that the secured creditor must be the party to bear the expense of the administration of the bankruptcy estate when it is solely for his benefit or he causes the expense incurred. See In re Hotel Associates, Inc., 6 B.R. 108, 110 (Bktcy. E.D. Pa. 1980). The court in In re Hotel Associates, Inc., supra, held that:

> "[C]ases under the former Bankruptcy Act stress the importance of the secured creditor's consent to a charge upon the secured assets. Early decisions of the Court of Appeals for the Third Circuit held that a secured creditor could be charged with the costs of administration to which he consented, expressly or impliedly, or which he caused. . . .consent was often inferred from the circumstances

> or from acquiescence, especially where there were no free assets for administrative expenses." (Emphasis added.) 6 B.R. at 111.

The test for determining whether the funds of the secured creditor may be attached in order to be pay administrative expenses of the estate is as follows:

1. Are the costs and expenses reasonable and necessary?

2. Are the costs and expenses incurred for the purposes of preserving or disposing of the secured property?

3. Have the costs and expenses benefited the holder of the secured claim?

See In re AFCO Enterprises, Inc., 35 B.R. 512, 514 (Bktcy. D. Utah 1983).

We believe that S-J has met this burden. S-J procured a 10-year lease with Aloha, a long standing and reputable airline, which agreed to rental payments of $90,000.00 per month for a full 10-

year term, in addition to furnishing the aircraft with the necessary second engine at its own expense. Aloha further agreed to return the aircraft at the end of the 10-year lease period with engines at half-life.

The contingent offer Greycas made to America West, on the other hand, was not nearly so lucrative. First, the proposition Greycas made to America West could not be consummated unless Greycas obtained possession of the aircraft. As has been stated earlier in this Opinion, Greycas at no time has been given possession of the aircraft; to the contrary, had been permanently enjoined from realizing such possession. Therefore, the deal that Greycas proposed to America West could never come to fruition.

Even if it had come into being, the unaccepted terms offered were not nearly so lucrative.

First, the lease to America West was to be for a 6-month term with a 10-year option. Conceivably, the lease could have been terminated at the end of six months, and the Debtor's estate would be in no better position than if the lease had never been entered.

Also, the lease called for a rental payment of $85,000.00 per month as opposed to the rental payment procured by S-J at $90,000.00 per month. Over the course of the 10-year lease, this amounts to a difference of $600,000.00

Furthermore, America West was to be given a rental rebate each month in order that it might proceed to lease a second engine for use on this aircraft. Said rebate would amount to approximately

$6,000.00 per month over the course of the 10-year period, or an additional difference of $720,000.00. This leased engine would not be returned with the aircraft at the end of the 10-year lease. As Aloha had agreed to return the aircraft with the engine at the end of the 10-year period, this involves an additional $600,000.00 increase to the value of the S-J lease agreement.

It appears to this Court that if Greycas had been able to achieve an agreement based upon the proposal it made to America West, that the proposal by S-J would still have benefited the estate by an amount of almost $2,000,000.00 more than that proposal made by Greycas. However, we cannot lose sight of the fact that the proposal made by Greycas was contingent upon Greycas obtaining equity in the aircraft from which it was

permanently enjoined. Since that is the case, the $2,000,000.00 figure is irrelevant; we must instead look to the full value of the lease procured by S-J.

This Court believes therefore, that the lease procured by S-J and the costs and expenses incurred thereby were necessary, did preserve the secured property and did operate to benefit the holder of the secured claim. Given this determination, we hold that S-J is entitled to the full compensation requested of $450,000.00 by Order nunc pro tunc.

An appropriate Order will be issued.

BERNARD MARKOVITZ
Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN THE MATTER OF:

F/S AIRLEASE
II, INC., Bankruptcy No. 84-1628

Debtor Motion No. 85-2157

ORDER OF COURT

AND NOW, at Pittsburgh in said district this 14th day of April, 1986, in accordance with the Memorandum Opinion of this date, it is hereby ORDERED, ADJUDGED and DECREED that the appointment of Lewis Simon and S-J Corporation is approved nunc pro tunc.

It is further ORDERED that Lewis Simon and S-J Corporation is entitled to compensation in the amount of $450,000.00

BERNARD MARKOVITZ
Bankruptcy Judge

APPENDIX D

STATUTES

§327. Employment of professional person.

(a) Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.

SECTION 330 (11 U.S.C. §330)

§330. Compensation of officers.

(a) After notice and a hearing, and subject to sections 326, 328, and 329 of this title, the court may award to a trustee, to an examiner, to a professional person employed under section 327 or 1103 of this title, or to the debtor's attorney-

(1) reasonable compensation for actual, necessary services rendered by such trustee, examiner, professional person, or attorney, as the case may be, and by any paraprofessional persons employed by such trustee, professional person, or attorney, as the case may be, based on the nature, the extent, and the value of such services, the time spent on such services, and the cost of comparable services other than in a case under this title; and

§503. Allowance of administrative expenses.

(a) An entity may file a request for payment of an administrative expense.

(b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including

(1)(A) the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case:

(B) an tax---

(i) incurred by the estate, except a tax of a kind specified in section 507(a)(6) of this title; or

(ii) attributable to an excessive allowance of a tentative carryback adjustment that the estate received, whether the taxable year to which such adjustment relates ended before or after the commencement of the case; and

(C) any fine, penalty, or reduction in credit relating to a tax of a kind specified in subparagraph (B) of this paragraph;

(2) compensation and reimbursement awarded under section 330(a) of this title;

(3) the actual, necessary expenses, other than compensation and reimbursement specified in paragraph (4) of this subsection, incurred by--

(A) a creditor that files a petition under section 303 of this title;

(B) a creditor that recovers, after the court's approval, for the benefit of the estate any property transferred or concealed by the debtor;

(C) a creditor in connection with the prosecution of a criminal offense relating to the case or to the business or property of the debtor;

(D) a creditor, an indenture trustee, an equity security holder, or a committee representing creditors or equity security holders other than a committee appointed under section 1102 of this title, in making a substantial contribution in a case under chapter 9 or 11 of this title; or

(E) a custodian superseded under section 543 of this title, and compensation for the services of such custodian;

(4) reasonable compensation for professional services rendered by an

(4) reasonable compensation for professional services rendered by an attorney or an accountant of an entity whose expense is allowable under paragraph (3) of this subsection, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title, and reimbursement for actual, necessary expenses incurred by such attorney or accountant;

(5) reasonable compensation for services rendered by an indenture trustee in making a substantial contribution in a case under chapter 9 or 11 of this title, based on the time, the nature, the extent, and the value of such services other than in a case under this title;

(6) the fees and mileage payable under chapter 119 of title 28; and [sic]

SECTION 507 (11 U.S. §507)

§507. Priorities.

(a) The following expenses and claims have priority in the following order:

(1) First, administrative expenses allowed under section 503(b) of this title, and any fees and charges assessed against the estate under chapter 123 of title 28.

(2) Second, unsecured claims allowed under section 502(f) of this title.

§102. Rules of construction.

In this title-- . . .

(3) "includes" and "including" are not limiting;

§1107. Rights, powers, and duties in possession.

(a) Subject to . . . to such limitations or conditions as the court prescribes, a debtor in possession shall have all the rights, . . . and powers, and shall perform all the functions and duties, . . . of a trustee serving in a case under this chapter.

Rules:

Bankruptcy Rule 2014. Employment of Professional Persons.

(a) Application for and Order of Employment. An order approving the employment of attorneys, accountants, appraisers, auctioneers, agents, or other professionals pursuant to §327 of §1103 of the Code shall be made only on application of the trustee or committee. . .